SMALL BUSINESS PARTICIPATION IN FEDERAL CONTRACTING: ASSESSING H.R. 1670, THE "FEDERAL ACQUISITION REFORM ACT OF 1995" — PART I

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

WASHINGTON, DC, JUNE 29, 1995

Printed for the use of the Committee on Small Business

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CONTENTS

SMALL BUSINESS PARTICIPATION IN FEDERAL CONTRACTING: ASSESSING H.R. 1670, THE "FEDERAL ACQUISITION REFORM ACT OF 1995"—PART I

THURSDAY, JUNE 29, 1995

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The committee met, pursuant to notice, at 10:06 a.m., in room 2359–A, Rayburn House Office Building, Hon. Jan Meyers, (chairwoman of the committee) presiding.

Chairwoman MEYERS. Well, this is what is left of us after a very long night. Some may be joining us later. But for those of you who don't know, the House met all night last night. So, we may have some Members who are going to run a little bit late and come back for the rest of the day.

Today the Committee on Small Business meets to receive testimony assessing the provisions of the proposed "Federal Acquisition Reform Act of 1995," H.R. 1670, and the effect that they would have on the ability of small firms to compete for Federal contracting opportunities. Although this bill was the subject of a May 25 hearing jointly conducted by the Committees on Government Reform and Oversight and National Security, representatives of the small business community were unable to testify due to inadequate time to analyze this 85-page bill—I think they were given the bill maybe a day or so ahead of time. Today, this committee will afford representatives of various segments of the small business community, and others, another opportunity.

If enacted in its present form, H.R. 1670 would fundamentally alter the Federal procurement process, but not in a way intended by its sponsors. Rather, analyses suggest that the resulting Federal procurement system would likely be substantially less open and fair, would invite more noncompetitive contracting, and cause small firms to have to confront additional obstacles to their participation. In short, a procurement process that diminishes the ability of small firms to sell to their own Government.

H.R. 1607 proposes that we abandon the standard of full and open competition, established by the landmark "Competition In Contracting Act of 1984," and return to the pre-CICA standard of "maximum practicable competition." Further, as drafted, the bill would leave to the career regulation writers the definition of maximum practicable competition. The bill would also eliminate the sys-

tem of justifications and approvals that have worked for a decade as an effective restraint on unjustifiable sole-source contracts.

H.R. 1670 would permit the use of "simplified procedures" for purchasing commercial products without any dollar limitation. Today, these simplified procedures, which are specified only in regulations, can be used for small purchases, contracts of $25,000 or less. Under last year's sweeping "Federal Acquisition Streamlining Act" (FASA), simplified procedures would be available for purchases of up to $100,000. These procedures encourage contracting officers to solicit offers telephonically and allow three calls to constitute, "competition." Some of today's witnesses have testified before this committee and other committees of the House and Senate that such regulatory authority for "three telephone call competitions" violates the Small Business Act.

In fact, H.R. 1670 would repeal, as duplicative, the very provisions of the Small Business Act that ensure adequate notice of contracting opportunities and adequate time for small firms to fashion an offer. These statutory protections for small firms have been part of the Small Business Act since 1983. They have been retained through every round of procurement legislation, from CICA in 1984, to FASA a decade later.

H.R. 1670 would also repeal statutory provisions that assure an open and fair process for the prequalification of contractors. Adopted in the mid-1980's during the DOD spare parts horror stories, they protect small firms from arbitrary exclusion from competition.

I'm going to skip the rest of my opening statement and ask that it be published in the record.

I do look forward to the additional information that will be provided in today's testimony. If the interests of small business Government contractors are to be preserved, it is essential that your concerns be thoughtfully expressed, and then needed changes vigorously pursued. As your advocates in the House, the Committee on Small Business will try to do our part.

I would like at this time ask if my colleague, Mr. Skelton, has an opening statement?

[Chairwoman Meyers' statement may be found in the appendix.]

Mr. SKELTON. Thank you very much, Madam Chairman. My opening statement is that I'm glad to be back and be a part of the Small Business Committee. This is very important legislation and we have looked at it in the other committees on which I serve. But I'm thrilled to be back with you and work with you.

Chairwoman MEYERS. I would like to say that we are very, very pleased to have Mr. Skelton join us again on the committee.

He has a background on small business issues that few Members of the House have and is a valued member of the committee. We are glad to have him here today.

Our first witness will be Jere Glover, SBA's Chief Counsel for Advocacy. Under Jere's leadership, Advocacy has been especially active in helping to shape legislative proposals and in commenting on implementing regulations. We would like to hear from you at this time, Mr. Glover.

TESTIMONY OF JERE W. GLOVER, CHIEF COUNSEL FOR ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION, ACCOMPANIED BY JIM O'CONNOR, CHIEF COUNSEL FOR PROCUREMENT POLICY, AND DEPUTY COUNSEL KIM RYAN

Mr. GLOVER. Thank you very much. Good morning, Madam Chairman, members of the committee. I'm Jere Glover, Chief Counsel for Advocacy, U.S. Small Business Administration. With me this morning is James M. O'Connor, he is the assistant counsel for procurement policy; and my deputy, Kay Ryan.

While this committee has been important in making sure that small business and procurement policy go hand-in-hand—and I think that the committee is to be commended with the procurement streamlining legislation being passed last year—the committee was in the forefront of making sure that the small business interests were preserved.

I think under the proposed legislation that we are discussing today, I think that it's equally important to the committee that while small business has over 40 percent of the Gross National Product and 40 percent of U.S. sales, they receive only about 20 percent of all Government prime contract dollars, amounting to $39.7 billion. Seven large contractors received $39.9 billion or more contract dollars than all of the small businesses combined.

Furthermore, McDonnell Douglas alone received $9.8 billion in Federal contract actions, or more than all minority firms in the aggregate received, and three times more than all women-owned businesses received. So, while we have done things through the years to open the Federal procurement process for small businesses, we still have a long way to go to make sure that small business has its fair share.

Competition is and always has been the basis of free enterprise and the foundation supporting our economy and the growth of small business. Historically, the Government has found competitive acquisitions accomplished through small firms are generally at lower costs than those with the large firms.

H.R. 1670 would, we believe, reduce the number of participating Government contractors by replacing "full and open competition" with a standard based on "maximum practicable competition". Small businesses received three times more contracts under the competitive process than they did under any noncompetitive process. Only 4 percent of noncompetitive contracts over $25,000 go to small businesses.

So we have empirical evidence that when we are faced with a sole-source type situation, a noncompetitive environment, small business doesn't do very well at all. That's why I'm very concerned with H.R. 1670 and its limitations on open full and competition.

We are concerned that the change from the language from "full and open competition" to "maximum practicable competition" as proposed in H.R. 1670 would give the agency contracting officers authority to limit significantly the number of possible vendor sources and erect barriers to new entrants. The proposed competition standard is achieved when a practicable, or perhaps a convenient number, of capable firms are permitted to submit offers on a procurement.

As we understand it, the bill would establish a system made up of verified firms or businesses that have met certain past performance or prequalification standards with the Government. The use of prequalification has the effect of denying to small business offerors the Congressionally mandated right to a second party review of the firm's qualifications to perform, a right that is established by the SBA's Certificate of Competency Program.

In other words, a system employing maximum practicable competition standards would give license to contracting officers to use a short list of verified firms with whom they have first-hand experience without exploring the marketplace for firms with comparable experiences that may be more competitive.

In 1980, while I was in the Office of Advocacy at that time, we commissioned a study to look at competitive versus noncompetitive solicitations. Much like the recent data that we have just discussed, we found then that small business also had difficulty in obtaining noncompetitive solicitations and did far better under a competitive process.

So this is the practice that has been going on for a long period of time. Clearly, the 1984 legislation has improved that situation somewhat, but we still see situations that have been there for quite a while.

Prior to 1984, Federal agencies could apply limited competition standards similar to what is being proposed in H.R. 1670 in awarding sole-source contracts. Unfortunately, the absence of open competition, resulted in higher Government costs and widespread waste and abuse in many Federal agencies. As a result, in 1984 the Congress passed the Competition in Contracting Act which established the current standard of full and open competition.

Competitive bidding keeps the contractor and the contracting officer honest. In the private sector we have a very strong motivator, which is profits, to make sure that we use a competitive situation that works. The Government does not have such a system.

I know that I speak for the entire small business community when I say that we are concerned about the speed in which procurement reform is being formulated. Less than 9 months ago the president signed the Federal Acquisition Streamlining Act of 1994. This is a major piece of legislation that would significantly change how the Government does business. Many implementing rules have been proposed and I believe that the final ones will be published soon. The small business community, however, is very concerned about how the implementation of the law will effect them.

Many of the procurement changes are happening quickly and without a full understanding of the impact on small business. Unfortunately, short-term efficiencies in process appear to be winning the battle over long-term tenets promoting competition, least purchase cost, and small business development.

Two weeks ago, almost 2,000 small business delegates from around the country participated in the White House Conference on Small Business. These dedicated entrepreneurs came to Washington at their own expense to formulate and send a collective message to our Nation's policymakers. These are hard working people, unencumbered by the politics that too often cloud decisions made within the beltway. Several of the top recommendations advanced

by this esteemed group of entrepreneurs focus on increasing access to Federal procurement opportunities and open competition.

Provisions in H.R. 1670 that appeared to restrict competition would bring the Government back 30 years, favoring the creation of explicit, yet limited, network of vendors that would supply the Government's needs, on their terms without the benefit of open competition. It would be a costly endeavor, as well as an exercise in regression, if the small business community would be sacrificed at the expense of less competition and higher Government prices for purchases and fewer procurement opportunities for small business.

Having said this, you need to know that my staff were invited to meet earlier this week with Chairman Clinger's committee staff to discuss H.R. 1670 and the concerns of the small business community. I have a meeting scheduled with Chairman Clinger tomorrow and I am encouraged by the receptivity and the willingness of Chairman Clinger and his committee staff to consider alternative language to certain provisions of the bill.

Thank you very much for this opportunity to testify and I will be happy to answer any questions.

[Mr. Glover's statement may be found in the appendix.]

Chairwoman MEYERS. Thank you very much, Mr. Glover. I understand that you have a meeting and you will have to leave in about half an hour. So, I think what we will do, without objection, is to ask questions of Mr. Glover and then hear from the rest of the panel.

Mr. Glover, you said that you got an indication from Mr. Clinger that he would be open to some changes in the legislation.

Did you get the feeling that he would be willing to go back to "full and open competition"?

Mr. GLOVER. No, I don't believe that he is willing to do that. I think that he wants to make his bill more small business friendly, but I think that he still feels very strongly that open competition is inefficient and is looking for something more efficient.

Chairwoman MEYERS. Has the Administration taken any policy position on whether the maximum practicable competition standard is preferable to full and open competition?

Mr. GLOVER. They have not to date taken a position.

Chairwoman MEYERS. I will defer to Mr. Skelton.

Mr. SKELTON. Well, as you know, the other committee on which I serve had a joint hearing with Mr. Clinger's committee. They seem to have two diametrically opposed theories here.

One is that absolute open competition allegedly slows down the procedure. Everyone and their brother, whether qualified or not, can bid. It causes a great deal of hardship on getting the job done. In other words, the language of Clinger's bill is very, very strict.

I would hope that in your discussions with Mr. Clinger you could meet the happy medium somewhere in between that was not given to us—that option was not given to us in the stage of the amendments, either in the committee or the full House.

So I would hope that you would do that. Because of my work on the other committee, I would appreciate your giving me the work product that you come up with.

Thank you.

Mr. GLOVER. I would be happy to do that, Mr. Skelton.

Chairwoman MEYERS. Mr. Glover, as I understand the bill, "maximum practicable competition," would be defined by the regulators?

Mr. GLOVER. That's my understanding. Having spent a good bit of my professional career working with regulators in some shape, form, or fashion either inside the Government or outside the Government, it gives me some great pause. Their motivations are different than, perhaps, we would want them to be. They always take the most conservative, they always take the most bureaucratic approach to their response; and they are always covering themselves very nicely to make sure that no one can criticize them.

There are, quite frankly, tens of thousands of lobbyists in this town who spend their lives trying to influence Government and individual contracting officer's decisions; former generals and others who are very good at convincing somebody that they should do something with them as opposed to small business who cannot afford that type of service.

Chairwoman MEYERS. Thank you very much, Mr. Glover, and we appreciate you being here to testify today. Will someone from your office continue to be with us throughout the day?

Mr. GLOVER. Yes, both Jim O'Connor and Kay Ryan.

Chairwoman MEYERS. Our next witness is Amy Erwin.

TESTIMONY OF AMY ERWIN, PROCUREMENT TECHNICAL ASSISTANCE PROGRAM, GEORGE MASON UNIVERSITY

Ms. ERWIN. Good morning. My name is Amy Erwin and I'm with the Procurement Technical Assistance Program at George Mason University. I am here today to speak on behalf of the Association for Federal Marketing Specialists. Michael Franklin, who is the president of that organization, was not able to be here today. I would like to start out by reading his letter into the record so that officially you will know where we stand on this issue. Then I will talk a little bit about some of the things that we have experienced at a PTA center, talking about the issues for small business.

The letter is dated June 28.

"Dear Representative Meyers, I'm writing this letter as the President of the Association of Government Marketing Systems Specialists on behalf of the 113 Procurement Technical Assistance centers located throughout United States. We represent hundreds of procurement specialists that are currently assisting 60,000 small- to mid-sized businesses conducting business with the Federal Government. We are closer to the issues and concerns of the proposed H.R. 1670 legislation as we work with the small business community on a daily basis. I apologize for not attending the hearing personally as I was not available at this time. With due notice, I would be more than happy and willing to attend and testify at subsequent hearings on this matter.

"Our collective opinion is that the implementation of this legislation would result in a procurement process that is less competitive, less open and fair, provide diminished access to the small business community and thus diminish the ability of small businesses to sell to the Government. We are concerned and somewhat perplexed on how quickly this bill is proceeding when the small business community does not yet fully comprehend the sweeping changes made by

the Federal Acquisition Streamlining Act of 1994 (FASA). We do agree with a streamlined process that will save taxpayer dollars, but if the implementation is not carefully done, the small business community will be severely damaged in the process. The small business community needs to be more involved in the process before more sweeping legislative changes are made.

"Our main concern is with the fundamental changes proposed for the legislation which we consider unsound. Changes such as abandoning full and open competition; permitting simplified procedures for the purchase of commercial products with no dollar limitation; repealing prequalification of contractors and not providing adequate notice of contracting opportunities would jeopardize any advances made in the procurement process within the last 15 years.

"By implementing these changes, it would leave too much discretion in the hands of contracting officers allowing the contracting officers to fulfill their contracting requirements by merely making three phone calls for any purchase. This would bring us back to the sole-source contract situation which is not in the best interests of the Government or the small business community.

"These proposed changes result in higher prices, less quality, and more importantly, would open the door to fraudulent activities setting the procurement process back 20 years. These conditions were the exact reasons why the Competition in Contracting Act of 1984 came about and the Government has benefited greatly from this legislation.

"If we are to make sweeping changes to a current system, we should focus on those areas that would save the Government money yet still provide fair and equal access to the small business community. Full and open competition must remain, simplified procedures should be limited to contracts under $100,000 for agencies that properly implemented FACNET as provided in FASA of 1994.

"Once FACNET is properly implemented, providing electronic access to contracting opportunities, then the higher thresholds can be considered. It is our opinion that the proper implementation will save the Government billions of dollars in mere processing, yet still provide the proper access to small businesses that is avoided by this legislation.

"In closing, we ask that fair and equitable assessment process be undertaken prior to the enacting of additional and sweeping changes as proposed by this legislation. We are in full support with the streamlining intent, but want to ensure that the final legislation proposed has the proper elements that accomplish the mutual interests of Government and the small business community. I urge you to work with our organization as we can fairly represent the interests of the small businesses and their concerns."

Mike goes on to list a phone number where he can be reached for comment.

[Letter from Michael Franklin, president of Association of Government Marketing Assistance Specialists may be found in the appendix.]

Ms. ERWIN. I think that the most important thing that we can say as a procurement and technical assistant program network is that my particular program works with more than a thousand businesses in the Northern Virginia and metropolitan area. They are

absolutely unaware of this legislation. They still don't understand FASA. They are still dealing with understanding what electronic commerce means and competition for small business means the knowledge of contracting opportunity.

For a small business to compete in this marketplace right now, they would have to be able to access more than 50 electronic bulletin boards, they would have to access the Commerce Business Daily, be able to negotiate with contracting officers, understand Small Business Administration's procedures and recommendations, as well as starting to implement changes to support further initiatives.

To implement this legislation while FASA is still being understood in the small business community is not only going to confuse the intent of contracting, but you are sending the wrong message to both voters and the small business community.

I think that the issue here is—the message that you are sending to voters here—is that we don't care about competition or the benefits that are derived by that. We are more interested in getting what we want when we want it.

The problem with that in terms of the small business community is that when you send this message now before FASA and FACNET have even been implemented, you are sending the message that FACNET is not what the Government's agenda is. Right now, the small business community is still reeling from enacted legislation. They are looking at this FACNET and EDI electronic commerce movement as another Government prerequisite. They are looking at it the same way the Government looked at the total quality management issues in the past and they think that they can wade through this process.

By passing this kind of legislation now without a FACNET implementation requirement, you are sending the message that they don't have to do that, and the Government's intent toward the small business community is not exempt.

Chairwoman MEYERS. Thank you very much, Ms. Erwin. As I understand it, you are speaking on behalf of Colette Nelson who is the acting vice president?

Ms. ERWIN. No, I speaking on behalf of the Association for Government Marketing Consultants and Specialists. I understand that Colette had something come up at the last minute and could not be here this morning.

Chairwoman MEYERS. Well, I am very glad to have you here. Is your deputy with you?

Ms. ERWIN. No, she is not.

Ms. RYAN. Kay Ryan, Jere's deputy.

Chairwoman MEYERS. All right, very good. I'm sorry, we don't have the proper nameplate in front of you.

Our next witness is Mr. William Blocher.

TESTIMONY OF WILLIAM F. BLOCHER, JR., AN INDIVIDUAL AND A SMALL BUSINESSMEN

Mr. BLOCHER. Thank you, Madam Chairman. I appreciate the opportunity to testify today on behalf of H.R. 1670; but today I'm addressing you as an individual and a small businessmen and not

as representative of any corporation, industry association, or community organization which I now serve or have served in the past.

As a matter of background, my early business background involves 15 years of experience in building a small family printing and micrographics company doing business in the commercial and Government markets. For the last 14 years, I have been in the information technology industry serving 7 years with a large Government contractor; and the last 7 years helping three different small businesses grow into multimillion dollar small Government services contractors. Since 1984, my primary function in the information technology area was management and continues to be strategic business development for companies in the Federal Government market.

From a personal point of view, there are many laudable recommendations in the bill. The most important one is the clear, strong statement supporting the position that the Government should rely on the private sector for needed goods and services. Other good features include the establishment of a consolidated U.S. Board of Contract Appeals; moving the protest forum out of GAO into the executive branch; repealing some of the onerous Procurement Integrity statutes and their replacement with broad protections of source selection and proprietary information to permit open communications between the Government buyer and industry seller; changes to the commercial item cost and pricing data, post-award audits, and cost accounting standards suggested in the bill deserve long consideration. Finally, the use of the Alternative Disputes Resolution to settle differences faster and cheaper is a good approach.

The potential of the changes noted plus the remarkable and thought-felt changes made by the Federal Acquisition Streamlining Act of 1994 have significantly improved the climate of doing business with the Federal Government. I would particularly like to single out the actions of Joe Thompson, Commissioner of GSA's Information Technology Service, for his foresight in challenging the business community to work with his agency and improving communications between Government and industry. This effort led directly to the improvement in debriefings as well as opening up the flow of critical information between buyer and seller; and has reduced and will continue to reduce the number of procurement protests in the future.

Additionally, I would like to go on the record supporting the retainment of the Brooks Act and the Competition in Contracting Act, CICA. Without these two critical pieces of legislation, the dynamic information technology industry that serves the Federal Government today would not exist. Instead you would have a semi-closed circle of contractors and vendors with the market strength to restrain new entries, especially new businesses.

What troubles me about the bill is contained in Title I-Competition, under Section 101 where the full and open competition provision of CICA is changed to a maximum practicable competition standard or objective. This change gives the Government bureaucracy too much power in restricting competition in one of our Nation's most competitive markets, that of providing over $200 billion worth of goods and services to the Federal Government. As the im-

plications of this provision become known a chill will settle over all but the largest of the industrial members of the Government contracting community.

This modification, if enacted, cannot help but inevitably hurt small- and medium-sized businesses. In all likelihood, its intended effect of eliminating competition will impact the smaller and newer businesses attempting to break into a market already dominated by a preponderance of large corporations.

I'm wary of proposals to remove regulatory burdens that are promulgated or supported by Government regulators and Government procurement officials together with large corporations. When I run into this type of proposal, I ask why?

We have been told in other testimony that the cost of procurement administration may outweigh the benefits of full and open competition. We have been told that the complexities of Government procurement and the high transaction buyer costs, and the user—in this case, Government employee, dissatisfaction require that we reduce the number of potential bidders. I am disturbed when this rhetoric gets coupled with statements of a desire for a Federal Government that costs less and is efficient, flexible, and responsive. Democracy is inherently not efficient.

The maximum practicable competition clause gives Government officials too much power over business decisions. Full and open competition is efficient and only hurts those who are truly not competitive. Anything less than full and open competition artificially restrains trade and hurts the smaller companies disproportionately.

I reviewed the comments of the Acquisition Reform Working Group presented at the May 25 hearings to the Committee of Government Reform and Oversight. Knowing their members and the overwhelming make-up of member associations which are disproportionately financed and controlled by the larger corporations, I respectfully question whether they are really interested in preserving competition or are they merely exercising their right to support what is clearly in their best interests, limited competition.

I ask you whom will benefit if we go back to the days of sole-source contracts and a closed circle of buyers. Not the little businesses and certainly not the startup corporations.

One of the most important goals that the 104th Congress has favored is the retaining of maximum value for the taxpayer for the services provided by the Government. This philosophy, of course, encourages concepts leading to minimum transaction costs for purchasing, calls for streamlined value-oriented competition, and concerns over the cost of conducting unlimited competition.

However, we must be willing to recognize the tradeoffs involved. Do we really want to reduce competition for Government purchases? I think not.

There are other public policies that must be placed on the scales. They should call for fairness in allowing all companies to compete for public contracts that use public tax moneys, and those also that encourage new companies to enter the marketplace to ensure innovation and to sharpen the competitive edge of existing suppliers.

Industry and Government data already indicates that the Government awards many large defense contracts as sole-source. This

money is public money. The Government, while benefiting from adopting some commercial practices that promote efficiency, is still dealing with public money and public trust. There is still a requirement of public accountability for use of public funds.

Maximum practical—practicable competition——

Chairwoman MEYERS. Thank you, makes me feel better.

Mr. BLOCHER [continuing]. is potentially a return to the old pre-CICA process of awarding to companies that the Government agency staff knows, and not necessarily to the most innovative company, or to the best value, and/or to the lowest priced offeror.

We have also had some suggestions that appropriate protections be provided for excluded companies that the agency should not permit to compete. That suggestion would be another legislative or regulatory band-aid applied as a direct result of not permitting full and open competition in the first place. This, I feel, is necessary for competition in the market in providing Government services. I ask you why are we creating a problem by killing the competitive process?

Let the free enterprise market process work. We don't have too much competition. As a small businessmen, please don't fence me out with exclusionary regulations.

As an aside issue, but part of this legislation, is FACNET. In discussions with many other Government procurement officials, I have heard voiced a number of concerns regarding FACNET. Will it transform the current cumbersome paperwork process? Will it reduce staff time for all parties? Will it substantially reduce transaction costs for purchasing as well as bidding? Or will it inundate the Government with hundreds of bids under the $100,000 purchase threshold that statistically make up 80 percent of Government purchases?

The procurement officials are rightfully concerned about these issues. Funding as well as new policies, processes, and procedures will be need to be developed if the new automated procurement approach is to be successful.

Is this concern one of the drivers to reduce competition from full and open to maximum practicable competition? FACNET is a good idea, in my opinion; but it will bring with it some new problems. They can be solved along with related issues, for example, of not allowing protest below $100,000. But there needs to be some oversight.

What protections are there for fraud and abuse within the Government? How do you handle debriefings, for example, for electronic procurement? How do we provide for accurate and timely contractor verification of performance? The ability to qualify bidders is conversely the ability to disqualify bidders. Many questions remain to be resolved.

On the topic of protest process, which is covered by the suggestion of consolidation, there have been many issues debated. Some feel we need to further simplify the process of resolving disputes and protests with increased flexibility. As a small businessman, I encourage you to take a careful look at the many proposals which would weaken the oversight function underlined by the procurement protest process. In my opinion, a strong bid protest forum is

essential for oversight where the expenditure of public funds are involved.

While there may be some improvements in this time of great changes at the Federal level of Government, we need to go slowly, especially when we are removing oversight protections against fraud and abuse of authority.

Chairwoman MEYERS. Take another minute or so to sum up. We do that as a guide, but I don't want to you stop in mid-sentence or anything.

Mr. BLOCHER. Actually, you have the rest of my comments on the protest issues in the copy that I submitted; so I will skip those in the interests of time. But I could come back if you have any questions.

There is a couple of other minor concerns that I have, that Congress should carefully review in these simplified procedures suggested by this bill. FASA provided a reasonable approach with certain dollar ceilings. Let us work with these guidelines and not take the ceilings off and not take the adequate notice provisions out of the regulations.

Commercial buyers have the authority to make these kinds of commitments, but they are accountable to their own sources of the capital funds that they spend. A new contractor verification system also concerns me in that without significant protection written into the law, this kind of system could lead to exclusionary practices. Industry needs time to asses the impact of FASA's past performance initiative before jumping into an even more restrictive approach of qualifying bidders.

In closing, I would like to thank the Chairwoman and the committee for taking the time to address matters proposed in H.R. 1670, particularly as they relate to the impact of small businesses. I know that you understand the critical economic importance of small businesses to America's economy. Please keep the full and open competition provisions of CICA alive and well.

Thank you for allowing me to testify here.

Chairwoman MEYERS. Thank you very much, Mr. Blocher.

Chairwoman MEYERS. I appreciate your testimony, and you have voiced a lot of concerns that were voiced on the floor of Congress on the day that we prevented H.R. 1670, as introduced, from being added to the FY 96 DOD authorization bill. It was in worse shape than it is right now.

So we are very glad to have your testimony.

Mr. BLOCHER. Thank you.

[Mr. Boucher's statement may be found in the appendix.]

Chairwoman MEYERS. Our next witness is Jim Lewin, vice president of Government Affairs for Sprint; not exactly a small business, but one which contributes significantly to the communities that I represent. They have been a valuable source of advice in the area of procurement policy in the past and I asked him to be here today.

Jim brings a substantial amount of expertise to the subject of today's discussions, having been a key staff draftsman of the legislation that became the landmark Competition in Contracting Act of 1984 (CICA). Like FASA in 1994, CICA was also a bipartisan effort jointly championed by Frank Horton and Jack Brooks in the House, and by Bill Cohen, Bill Roth, and Carl Levin in the Senate.

Mr. LEWIN. Thank you, Madam Chair. With your indulgence, I would like to introduce my wife Carole, who accompanied me here today, to cheer me on.

Chairwoman MEYERS. We are very glad to have you here with us.

TESTIMONY OF JAMES E. LEWIN, JR., VICE-PRESIDENT, GOVERNMENT AFFAIRS, SPRINT

Mr. LEWIN. Thank you Madam Chair for inviting me to appear at this hearing to share Sprint's views on H.R. 1670, the Federal Acquisition Reform Act of 1995. Sprint's comments are focused mainly on two aspects of the legislation; the repeal of the Competition in Contracting Act's requirement of full and open competition in the Federal marketplace, and the continuation of an effective competition enforcement mechanism at the proposed U.S. Board of Contract Appeals.

Although Sprint has revenues approaching $13 billion annually, our company is a relative newcomer to the Federal marketplace. Our first large Federal contract came in 1988 when GSA selected us as one of two vendors to perform the FTS 2000 contract. This contract was awarded to provide state-of-the-art long distance voice, data, and video services for the U.S. Government over a 10-year period.

At that time, Sprint had the Nation's only all digital and all fiber optic network and was clearly the leader in applying the latest in telecommunications network technology. This is still true today. However, Sprint, as a long distance company, was in existence only 2½ years prior to the award of the FTS 2000 contract. Clearly Sprint was an outsider facing large competitors who were already firmly entrenched in the Federal procurement arena. Without the full and open competition requirements of CICA, Sprint would probably still be an outsider today. We therefore have a special affinity for those small businesses who fear permanent outsider status, or fear the return to the days of less than fully competitive procurements.

While several changes to the Federal acquisition system envisioned by H.R. 1670 could have an adverse impact on Sprint, the impact could be catastrophic to small vendors. We are pleased that this committee has taken the time to review the long-term implications of H.R. 1670 and the impact that it could have on the Government's $200 billion a year procurement system.

Sprint has a long history of supporting procurement reform in an age of full and open competition. We are deeply concerned about H.R. 1670's substantial move away from this competition standard and elimination of supporting provisions that require procurement officials to justify noncompetitive procedures.

We are not aware of any recent studies or surveys describing specific problems in the current Federal procurement system that need legislation to correct them; much less how specifically this bill would address them. In fact, the most recent comprehensive review of the Federal procurement system was in 1993, and I believe it was directed as a result of Armed Services Committee legislation. That study panel, the Section 800 panel, concluded that the elimination of full and open competition was not wise.

When the Competition in Contracting Act was passed in 1984, it's opponents argued that moving away from awarding sole-source contracts would dramatically increase the costs of contracting within the Federal Government. However, the opposite has occurred.

Over the last 11 years, CICA has greatly increased the number of noncompetitive procurements and it has saved the Government billions of dollars and greatly improved the quality and services the Government receives.

One example of this is the FTS 2000 project. GSA has reported that the taxpayers will save more than $4 billion over the life of this contract. The reason that such cost savings are achievable is because the initial FTS 2000 award was made on a fully competitive basis. The two winning contractors were placed in an environment where continuous competition is occurring throughout the life of the contract. FTS 2000 in my view, is one of the most successful contracts ever awarded by a Government agency. The basis of that success is full and open competition.

I would like now to turn to the subject of contractor verification. As part of eliminating CICA's requirement for full and open competition, H.R. 1670 establishes a process called verification, where Government agencies will decide who can and who can't compete for Government contracts. Such a verification process would lead to participation barriers to those companies that can provide the most innovative products and services at lower price.

Certainly many of the companies eliminated in this process will be small startup companies that will not have the money or the insider's knowledge to break through the type of old boys' network that existed prior to CICA and could exist again under H.R. 1670. Sprint believes that the result of all of this very well could be that eventually only a few well-connected companies will be receiving a lion's share of the Government's business in the future. In my written statement I have outlined additional concerns with provisions of H.R. 1670 dealing with the new so-called special simplified procedures, which could be used to avoid competition and the evisceration of the procurement integrity standards. Sprint opposes these provisions.

There are other areas of H.R. 1670 involving the reduction of red tape and paperwork, the strengthening of the bid protest system that Sprint strongly supports. Sprint is pleased that the legislation recognizes the importance of the General Services Board of Contract Appeals (GSBCA) bid protest forum by maintaining GSBCA functions in the proposed unified board. We believe that the GSBCA has performed a unique and invaluable role in helping to maintain a competitive Federal marketplace in ADP and telecommunications. The GSBCA protest forum has acted as an enforcement mechanism to insure that Government agencies follow Federal procurement laws and regulations and treat potential contractors fairly and equally.

I must state, however, that without a meaningful competition standard to enforce, the Board's authority would be hollow. A thriving competitive Government procurement system needs two parts; a standard that requires full and open competition and an effective mechanism to insure that the competiton standards are, in fact, followed. H.R. 1670 provides us with only one part of that equation.

In closing, Madam Chair, H.R. 1670 could have a very real impact of costing the Government billions of dollars every year by encouraging noncompetitive procurements and driving small successful and innovative companies out of the Federal marketplace. Sprint strongly urges Congress to thoroughly analyze the implications of H.R. 1670 before it rushes to enact this legislation.

Sprint wants competition to be the norm in the Federal market, not an aberration. H.R. 1670, as currently written, will not achieve this result. Sprint would be pleased to work with Congress to develop changes to H.R. 1670 that will improve the Government's procurement process without undermining the principles of full and open competition which has served the Government and the taxpayer so well.

Thank you.

[Mr. Lewin's statement may be found in the appendix.]

Chairwoman MEYERS. Thank you very much, Mr. Lewin.

We will question this panel and I would like to start with Mr. Skelton.

Mr. SKELTON. Thank you, Madam Chairman. I have only one question.

Mr. Lewin you could probably answer this, it's pretty basic. In H.R. 1670, as you pointed out, there is a contractor verification process. As it is now written, would that verification process lead to multitudinous lawsuits by those that didn't make the list, slowing down the process? Would that interfere?

On the other hand, when you have open competition, no one would say that it makes the list because everybody would make the list.

Do you have an opinion on that?

Mr. LEWIN. Initially, there would be a lot of lawsuits because the vagueness of a lot of those terms. You are going to create some confrontation and dissension and that would only be handled by the courts. I think initially that if the provision stays the way that it is, the regulators will write very precise definitions of what this means, and probably people would be able to defend it in court.

Mr. SKELTON. Do you have any suggested procedure that is somewhere in between? Because the complaint is that when you have open competition, so many who couldn't do the work, aren't qualified, come in and take a great deal of time and effort of the buying agency.

Do you have any recommendations on some happy medium that we might look at, as a better phraseology?

Mr. LEWIN. Well, Congressman, I think that I'm not being frivolous when I say that current law already allows and has controls over the bidding process so that the Government only has to consider qualified vendors. The Competition in Contracting Act only requires that the Government agencies consider the bids of all qualified Government contractors. Even then, those qualified contractors have to be within the competitive range and have a history of trying to supply that product or service.

I don't know why that hasn't worked for the buying agencies. I don't understand why Government agencies think they have to deal with anybody whether they are competent or not. Certainly CICA doesn't say that and I don't believe that the regulations say that.

What I have heard is that the people at the contracting officer level are fearful to say no because they feel that they have to consider everybody's bid. But clearly, the law does not reflect that and neither do the regulations. I think it is a management problem and not a legislative problem.

Chairwoman MEYERS. Thank you, Mr. Skelton. Mr. Kennedy?

Mr. KENNEDY. Thank you, Madam Chairman, and I appreciate the opportunity that you have given us to have these hearings and get these issues flushed out.

As a representative of Rhode Island, we have a large small business community, and also a large small business community that wants to be more actively participating in Government procurement. I'm particularly interested in opposing many of the facets of this legislation that I see taking us in the wrong direction. All in the name of reform, however.

I would be as anxious as my colleague, Ike Skelton, to hear some ways that we can countermand the rush to reform, to offer alternatives to the ones that have been offered so far, such as the repeal of the full and open competition. Because I think that that would take us in the wrong direction, like the repeal of the safeguards for small business in the prequalification process and the loss of adequate notice in the new simplified acquisition process.

I think that all of these sound awfully good, but in practice make it more difficult for small businesses to compete. Small businesses are already disadvantaged in my State because, from listening to them, they have problems accessing the capital necessary for them to make the bid and do the work. Many times they are paying the interest on the money that they borrowed so that they can do the job on time for the Federal Government but the Federal Government doesn't pay them on time. They end up eating the cost of the interest because they were ambitious enough to go out and get the work and be awarded the work because they had the merit and the talent to do the work.

Now they are clearly at a competitive disadvantage with the bigger businesses that can afford to float the capital and do the work and take the extra time that the Federal Government often leaves them hanging out there before they get paid for the job that they complete.

So there are a number of issues that I'm interested in working with the Chairwoman on and making sure that the small businesses have a more fair and level playing field.

I would ask that I could submit into the record a letter from my State of the Rhode Island Port Authority Procurement Administrator, Dan Lily, who has addressed some of these concerns in greater detail.

Chairwoman MEYERS. Without objection. We appreciate that.

Mr. KENNEDY. Thank you, Madam Chairman.

[Material submitted by Mr. Kennedy may be found in the appendix.]

Chairwoman MEYERS. Mr. Baldacci? Mr. Baldacci is a member of this committee and we are very pleased to have him here.

Mr. BALDACCI. Thank you very much, Madam Chair. It is a pleasure and honor to be here. Rather than be repetitive, I would only like to say that I want to reinforce everything that has been

said from this side of the table, and I will enjoy working with you and making sure that that actually comes to fruition.

Thank you, Madam Chair.

Chairwoman MEYERS. Thank you, Mr. Baldacci. I have some questions and then we will move on to our next panel.

Mr. Blocher, would you discuss your concerns and comments on the bid protest system, the current system and as proposed in H.R. 1670?

Mr. BLOCHER. The basic arguments that we get about the protest process is that it takes too long, it's too expensive, and there are far too many protests. With the number of bills that are floating around, not just H.R. 1670, there is serious concern about that subject.

In my opinion, the bid protest forum is absolutely essential for oversight. We need to be extremely careful in seeing that the protest forum remain a strong alternative to address mistakes that occur, in the procurement process. The bid protest process is essentially one of the very fundamental things that makes the procurement process fair.

Chairwoman MEYERS. Relating to the question that Mr. Skelton asked about firms that are considered not eligible, if those firms are eliminated early in the process, does the protest process start then?

Mr. BLOCHER. It could start then through, say, an agency protest if someone felt they were unreasonably eliminated.

Chairwoman MEYERS. Are you aware that such protests take place in any great degree? I think that was an argument that was made on the floor.

Mr. BLOCHER. That what takes place?

Chairwoman MEYERS. That although unqualified bidders can be eliminated early in the process, that there is some concern that a great many protests would be filed.

That was asserted to me and I have no way of knowing.

Mr. BLOCHER. Well, the numbers don't seem to support that over the last couple of years.

Again, the big problem you have is these statistics can be looked at from the beginning of the GSBCA's jurisdiction when there were a lot of protests. Industry was basically winning a lot of rounds with the Government due to the fact that a number of procurements were not being run in accordance with the rules and the terms and conditions contained in the RFP (Request for Proposals).

Over time, the Government individuals involved in procurement got smarter, they took more time, they provided some risk assessment in terms of limited decisions they were making. Frankly, they got better at obeying their own rules and regulations. That has lead to a reduction in the number of protests, particularly those that are upheld by GSBCA.

For instance, I have seen some numbers on major procurements that less than 90 percent of the procurements that are sustained by GSBCA, that is, the buying agency's position is overturned. Rather, there are whereas overwhelming numbers in the other direction, that the agency prevails once they prove that their decision was correct.

Chairwoman MEYERS. Would any of the rest of you like to comment on the question that I just asked? Ms. Ryan, I will ask you first. Were you present at the meeting the other day when Mr. Glover met with Mr. Clinger?

Ms. RYAN. Yes, Jim and I were both at that meeting. We didn't get into the number of protests. I wrote a note to myself about this for us, because I don't know if there is any data available.

Chairwoman MEYERS. I think that would be worthwhile because that was one of the justifications given for H.R. 1670's change in the process. Mr. Blocher?

Mr. BLOCHER. I've heard that a company called Federal Sources, Incorporated tracks Federal procurements. They have done some studies on the protest process and they have some very interesting data. I think that the contact would be Mr. Robert Dornan, who is vice president of the company.

Ms. ERWIN. I think one of the things that we need to look at, too, that when we get to the point that contracting agencies are eliminating competitors, there are other processes available to the small business community that don't necessarily lead to a protest.

I think that Mr. Glover talked about these programs.

Chairwoman MEYERS. Say that last sentence again——

Ms. ERWIN. Mr. Glover discussed that there are alternatives programs used, and successfully used, by small business as an alternative to a protest.

It's my opinion that there is a resentment to that process because of its time lag and in their procurement policies and practices. But that it just doesn't incorporate money and finances or any of the difficulties associated with the protest.

Within the acquisition legislation, you would be exempted from that type of issue as opposed to resolving it.

Chairwoman MEYERS. Mr. Lewin, did you have a comment?

Mr. LEWIN. Yes, actually more than you would probably want to hear.

I think that the claims that the bid protest system is slowing things down, is somehow giving incompetent people a forum to challenge the agency's decision, are not the issues. It's simply a mischaracterization of the system.

There is a study by the Washington Legal Foundation—the actual authors are Jed Babbin and Thomas Earl Patton—that has the statistics to backup what I am saying. I would suggest, with your indulgence, we could put it into the record.

[Washington Legal Foundation study by Messers. Babbin and Patton may be found in the appendix.]

But the fact of the matter is that the number of protests since the GSBCA was given bid protest authority, the number of protests has gone down. They have authority within that board to throw out frivolous protests. They have, in fact, done that. They have a very large workload and they don't want to deal with people who have a frivolous protest. They want to get right to the issues of the bid protest that need deciding on major procurements and major procurement policy issues. I just don't believe that there are any studies that would indicate anything different.

Chairwoman MEYERS. We appreciate your comments and your expertise.

Ms. Erwin, could you give the committee and our guests here today some background on the types of clients that the Procurement Technical Assistance Centers counsel, and what are the most common problems faced by small businesses who wish to compete for Government contracts?

Ms. ERWIN. That's a big question. There are 113 procurement technical assistance centers. They tend to specialize based on the type of small business——

Chairwoman MEYERS. I notice people are having difficulty hearing. These microphones are very directional.

If you could get right on top it and speak very directly into it?

Ms. ERWIN. That's a difficult question, there are a 113 PTA centers in the Nation right now. They all specialize, to a certain extent, around the needs of small businesses in their communities.

There is a significant range around what those small businesses do. For example, my center has a lot of technology companies. The small businesses tend to be very high tech in nature. In southwest Virginia, there are a lot of manufacturers and commercial software suppliers. In general, our clientele is limited to companies that are smaller than 500-employee size standard of SBA.

You get everything from a small startup to approximately 2 years in business that is trying to enter the Government market to your company that has been around 10 years, its average size could can be 100 to 150 people. My particular center's average client base is someone who has been around the business for 5 years, is probably just entering or within the first year of marketing for Federal business. Their annual revenues are somewhere between $3 and $5 million.

In terms of what are the most difficult aspects of the Federal Government, I think that's pretty clear. They have a hard time marketing. They have a lack of overhead personnel to actually penetrate the Government marketplace. The Government systems are not designed to easily get information about routine procurements, up-coming special procurements in typical areas. Finding opportunities is a large requirement, there are more that 120 electronic bulletin boards. The Commerce Business Daily (CBD) limits a lot of competition and a lot of background marketing is done long before the CBD notice appears.

Small businesses just don't have the resources to compete with that kind of inside knowledge. So, they find themselves being reactively marketing for business versus proactively marketing for business. That's a real hardship.

That's one of the biggest concerns of this legislation. To the extent that some of that information is available now, a lot of that information is a lot less accessible by the small business community with a limited competition.

Chairwoman MEYERS. I appreciate your comments, Ms. Erwin.

Can any of you give me any ideas if there have been studies done that estimate the amount of savings that occur when a project is bid as opposed to sole-sourced? I just don't know if anybody has done any surveys or studies that would give any kind of an indication.

Are any of you aware of any?

Mr. LEWIN. Not recently, Madam Chair. I mentioned in my testimony that the FTS 2000 project saved $4 billion of a $10 billion procurement, so it's roughly a 40 percent discount.

When CICA was originally passed, there were numerous studies, committee studies indicated that the discounts ranged anywhere from 25 to 70 percent with specific references to specific procurements, that is in CICA's legislative history. We are experiencing those kinds of discounts because we are giving it in this competitive marketplace.

I don't know of any recent studies on either side of this issue, but we certainly given those kinds of discounts as we are competing in the Federal marketplace.

Chairwoman MEYERS. Thank you, Mr. Lewin. One of the key principles driving H.R. 1670's provisions is to give greater discretion to regulation writers and contracting officers.

Do the current procurement regulations afford contracting officers the needed business discretion?

Ms. ERWIN. I think that they personally have it, but they may not be exercising it.

What you find when you talk to Government procurement people is that Government purchasers, by nature, are taught and managed to be sure to work within the rules. Where rules give freedom for interpretation, they feel very nervous. I don't think that's necessarily the bid protest impact, it's more of the fact of the personality that is developed and promoted within the organization.

To a certain extent, you think you are going to have to reeducate the persons who are there now. I think the current legislation allows people to make the quality decisions they need to make, they just don't exercise that authority. To the extent that they pass this legislation as it is now written, what you are going to find is that regulators are going to interpret that legislation as tightly as they can and procurement people will only liberally interpret it, if they have a specific need.

I think that the SBA has made very clear their concerns about fraud and some of the bigger issues, but I think there is a more basic issue of human nature that people are going to take the easiest route to get done what they have to get done within the rules. I think that's the real issue when you talk about this kind of legislation.

Chairwoman MEYERS. Exactly. Mr. Blocher?

Mr. BLOCHER. I think that the problems with the procurement officials in this area is their impression that they can't do certain things.

I think it's a leadership that has been shown to continue through the Office of Federal Procurement Policy could loosen a lot of the shackles that seem to bind them, particularly within the area of talking with industry and providing information.

They actually have a lot more freedom than they currently interpret. They, for the most part, have been advised by the general counsels and the attorneys more than people who would make it easier to compete within the Government environment.

Chairwoman MEYERS. Well, I appreciate all of you being here today, and I think that we will move onto panel two at this time.

Again, thank you for being here; and I'm sorry that we don't have more of our committee members here this morning.

Will panel two come forward and be seated. Thank you all for being here.

Our first witness today will be Tom Frana, president of ViON Corporation, a small high technology firm located here in Washington, DC. His company focuses their marketing on the Government and they have been successful. He is in a solid position to assess the impacts of procurement policy changes being proposed in H.R. 1670. Tom is also an active member of the Computer and Communications Industry Association (CCIA) which has submitted a statement for the record.

Would you begin?

TESTIMONY OF TOM FRANA, PRESIDENT OF VION CORPORATION

Mr. FRANA. Madam Chairman Meyers, thank you for the opportunity to express my concerns on H.R. 1670. I'm here representing both CCIA and ViON. But let me take a moment to preface my remarks with a brief description of ViON so that can you see why H.R. 1670 and the implementation of it are of concern.

ViON is a small business employing 31 individuals. We are a hardware integrator exclusively focusing on the Federal Government mainframe marketplace. ViON was formed in 1980. Over the last 15 years we have performed successfully on major contracts with Social Security, Justice, FBI, Customs, DOD, and IRS to list a few. Our most recent significant win was the IRS CSM/MIA procurement valued at just under $100 million that provided the latest generation of mainframe and peripheral products to the IRS.

ViON, as a small business vendor to the Federal Government, has long supported the need for sensible procurement procedures and reforms. However, for reasons that I outlined below, I fear that H.R. 1670, if passed without modification, could do harm.

Section 101 would amend existing regulations by replacing full and open competition with maximum practicable competition. By repealing the standard of full and open competition, Government agencies would be encouraged to exclude those companies which have not already demonstrated their abilities, thereby prohibiting new participants from entering the market. If the Government receives and evaluates too many bids from unqualified vendors, it's time to face up to some of the real causes of that problem. Government contracting officers not clearly defining their needs and/or allowing less than fully qualified vendors into competition.

By rewriting 10 USC 2304 (c), (d), and (e), H.R. 1670 would eliminate the statutory standard for other than competitive procedures. This existing statutory criteria for noncompetitive procedures were established to end unjustifiable sole-source procurements. Clear statutory guidelines provide the basis for rational decisions.

The withdrawal of previously committed requirements for informing small, small/disadvantaged vendors of revenue opportunities in the Commerce Business Daily, when FACNET is not available has not been helpful. I now fear that OFPP will launch test programs that only the largest vendors would be able to find and

compete for. The notice requirements have been and continue to be a necessary source of information and protection for the small business community.

Recently, we reviewed 200 Government online bulletin boards located 50 that deal with procurements of interest to ViON. We have gone through lengthy, time consuming, and frustrating process of contacting the bulletin boards and/or in some cases the individuals for the bulletin boards to gain access.

No two bulletin boards are the same. It's difficult to tell what information has been updated; and from 8 a.m. to 5 p.m. timeframe, it's difficult to gain access. We now find agencies augmenting their CBD notices with referrals to Internet. One agency has stated that all purchases between $100,000 and $500,000 would use Internet only.

Today we have to track CBD notices, multiple bulletin boards in different formats, and now the Internet. Companies, especially this country's smaller companies, need to know easily and quickly where business is in order to fashion responsive and responsible offers. This is a feet-on-the-street issue, not a problem for companies with a lot of sales people covering all possible business points, but a genuine disadvantage for others.

Amending the OFPP Act to define a new standard of maximum practicable competition would invite protest after protest to define what the new standard means whereas full and open competition is in case law and understood by the bidders and agencies alike. The proposed USBCA [United States Board of Contract Appeals] could be spending most of its time interpreting a new standard, and not preserving competition. The much expanded prequalification structure for Government offerors would tend to create a system of verified contractors, prequalifications based on the past, and has the effect of denying small business offerors the right of a subsequent opportunity to participate. Furthermore, whenever you make an arbitrary cutoff list without re-review for responsibility and responsiveness, you never know if you have eliminated a potential winner.

Whenever competition is increased, cost savings also increased. In award of contracts for commercial items through simplified procedures regardless of dollar amount, when simplified procedures means, purely and simply, the telephone solicitation of only three firms of a contracting officer's choosing may be competitive in some cases to a sole-source at the limit. Furthermore, commercial items are defined to allow not only items actually sold in the marketplace, but even unbuilt items that are intended to be offered in the future; a procedure that is appropriate in some cases, but not in others.

It's good to have the Government's reliance on the private sector for goods and services in the proposed law. It's equally important that inherently governmental functions be restricted to Government employees.

The elimination of the specific certification requirements referred to, and the removal current regulatory certifications, unless retention is supported by written justification, are not bad things; nor is the prohibition against including new certification requirements in the FAR unless mandated by statute or justified in writing.

The consolidation of duplicative activities and a clear scope given to a single protest authority modeled on the GSBCA is laudable. A single protest forum is healthy, will be more cost effective, and will provide a proper forum for vendor policing of an open market where full and open competition is the rule.

It's easier to be critical than constructive. We have critiqued H.R. 1670, but we have attempted to be constructive. Permit us to observe there is work yet to be done. You need to be complimented on your efforts today, but by factoring the results of actual day-to-day regulatory operations of FASA I that also needs to be reviewed, that will require patience, time, and effort. Your common vision is on target with constricted budgets and limited taxpayer dollars. It's crucial that the Federal procurement system run fairly, efficiently, and most importantly, cost effectively.

Madam Chairwoman, thank you for the opportunity to present my views today. Please remember a small business needs knowledge of procurements, ability to complete, and effective redress.

Thank you.

Chairman MEYERS. Thank you very much, Mr. Frana.

[Mr. Frana's statement may be found in the appendix.]

Our next witness is Jerry Nowak. He is president of the Meridian Construction Company in Gaithersburg, Maryland. He is representing the Associated Builders and Contractors and will share with us the specific perspective of those engaged in construction.

Mr. Nowak?

TESTIMONY OF GERRY NOWAK, PRESIDENT, MERIDIAN CONSTRUCTION

Mr. NOWAK. Good morning. My name is Gerry Nowak, and I'm president of Meridian Construction Company of Gaithersburg, Maryland. I am pleased to be here today to testify on behalf of the Associated Builders and Contractors, of which we are a member.

ABC is a national trade association representing approximately 17,500 contractors, subcontractors, material suppliers and related firms from across the country and all specialties in the construction industry. Our diverse membership is bound by a shared commitment to the merit shop philosophy of awarding construction contracts to the lowest responsible bidder, regardless of labor affiliations, through open and competitive bidding. This practice assures taxpayers and consumers the most value for their construction dollar.

I appreciate the opportunity to appear before the committee to represent the Nation's construction industry and to comment on recent efforts to overhaul Federal procurement and acquisition laws. While ABC members are interested in many of the ongoing efforts to reform the Federal procurement system, I will focus my comments on Title I of H.R. 1670, the Federal Acquisition Reform Act of 1995.

While ABC commends Congress for its efforts to streamline the costly and inefficient practices of the Federal procurement system, however, provisions of Title I of H.R. 1670 would have unintended and significantly adverse consequences on the Nation's construction industry. The legislation would institute fundamental changes in the Federal procurement competition standard by lessening the

current system of full and open competition and replacing it with a maximum practicable competition standard.

It's a basic tenant of the free market system that all sources be given the opportunity to compete for work. This includes full and open consideration for Government construction contracts for all bidders, large and small, old as well as new entrants in the Federal market. The current procurement system has adequately provided the construction contracting community with equal access to participate in the Federal procurement programs, and has restricted the opportunity for partiality and abuse within the system.

Under this bill, the Federal procurement officer would be authorized to obtain competition only to the extent of maximum practicable. This would reverse the statutory standard of full and open competition, which was enacted in 1984 to eliminate the earlier practice of maximum practicable, and the sole-source contracting it fostered. Essentially, agencies will now be allowed the narrow the field of competition and determine the competitive range, presumably on a case-by-case basis for each contract.

Although the stated goal is to insert a commercial-like process in the Federal procurement system, there is a fundamental difference between the Government and private sector. The Federal Government uses taxpayer dollars for procuring business services. With this comes an obligation to provide the tax-paying public with a fair and equal opportunity to compete. Any American business which has a capability to perform the contract should have equal access to the Federal Government. No business, no matter how large or small, should be precluded from competition at the prebid stage. Full and open competition assures fairness in a Federal purchasing process which has significant potential for subjectivity and abuse.

In my own business, I know how easy it is to select certain subcontractors to do work just by skewing the bid requirements to a particular subcontractor. We don't do that, but it's easy to pick one over another.

The bureaucratic process should not select the field of competent competitors. The market, which provides it's own effective screening process, should be allowed to determine which companies are able to compete. Competitive range defined by contract specification and market forces which screen out the unqualified contractors.

All contractors bidding the Federal Government must obtain bid bonds, which I can assure you is a very rigorous process. The bonding companies which do assure that the work will be done properly and on time and within the budgets are, in effect, very hard to please and must have constant input into our business.

H.R. 1670 would essentially repeal the statutory protections in place for construction contractors and leaves implementation totally to the discretion of the regulators. Allowing unfettered discretion and deciding the appropriate categories of contractors will foster significant potential for abuse by procurement officers with hidden agendas and ultimately could create an exclusive and limited network of vendors and services to the Government. Providing a procurement officer with the ability to exclude companies from competition in the prebid process will particularly hurt small com-

panies and businesses seeking entrance into the Federal market. Allowing less than full and open competition would essentially encourage the procurement officer to exclude companies which have not already demonstrated their ability in Federal contracting, creating a preference to those penetrating the market to the disadvantage of new entrants.

Restricting competition prior to the bid process would result in bias toward the larger and more experienced contractors who are better positioned and can virtually guarantee their being on that short list. For construction, this will certainly limit the development of our industry. New companies are unlikely to be considered for contracts. The current standard of full and open competition has been a proven method to assure equal access for all qualified contractors and has made it possible for these construction contractors to gain entry and build a resume in Federal work.

Efforts to reform the Federal procurement system should not only benefit the Federal purchasing agents or the large companies who receive the majority of the contracts, but should strengthen the opportunities for local and small businesses, and certainly not impose further obstacles for these companies to enter the Federal market. An open market system encourages new entrants and everything else is prohibitive.

I'm unaware of any studies that have demonstrated that too much competition is expensive. In fact, vigorous competition lowers prices and helps assure that taxpayers receive only products at reasonable prices. Substantial budget and taxpayer savings occur when the open market forces are allowed to work. Government should take advantage of increasingly competitive markets and not try to limit it in the hopes of making bureaucracies more efficient. The reverse, the bureaucracy should learn from the competitiveness of the market.

Finally, ABC strongly believes that the competitive sealed bid process is a proven method of procurement which serves the Government, taxpayers, and the construction industry. While it is preferred over the negotiated procurement and other methods because it is simpler to administer, creates more competition, and is less subject to fraud and abuse, and generally insures a higher quality product. It should continue to be the preferred method of awarding construction contracts. In conclusion, it is the Government's responsibility to its taxpayers to obtain a lowest possible price in procuring goods and services. This can be achieved in awarding construction contracts under current procurement laws which allows unrestricted competition and provides statutory safeguards designed to insure a field of qualified and responsible contractors. Established limitations for bid process is an effective and objective procedure which provides equal access for responsible construction contracts or a guarantee surety requirements for bid, performance, and payment bonds.

On behalf of the Associated Builders and Contractors, I again want to thank Congresswoman Meyers and the members of this committee for the opportunity to testify here today.

I would be happy to answer any questions. I do have a bid session in the next hour, so I would request to leave by then, if that were at all possible.

Chairwoman MEYERS. Thank you very much, Mr. Nowak.

[Mr. Novak's statement may be found in the appendix.]

Our next witness, Matt Forelli, is president of Precision Gear, Inc., based in New York City. He brings the perspective of a precision manufacturer who markets to the Government, principally the Department of Defense. He knows firsthand the anticompetitive biases that contributed to the some of DOD's spare parts horror stories of the early 1980's.

Mat is representing the American Gear Manufacturers Association, and we are glad to have you with us.

TESTIMONY OF MATTHEW S. FORELLI, PRESIDENT, PRECISION GEAR, INC.

Mr. FORELLI. Thank you, Madam Chair and distinguished members of this panel—despite the fact that they have been up earning their pay all night—for scheduling this hearing, a topic of great importance for all small manufacturers.

My name is Matt Forelli, I own a company called Precision Gear in New York. We have been there for 58 years manufacturing the flight safety highly critical precision gearing purchased by the Department of Defense and initially supplied to the major Orginal Equipment Manufacturers (OEMs) of the weapon system. The example that you see before you (indicating) is half a sample of one of our products.

Our gearing products are integral parts of the air frame drive systems, and the engines that power them, in systems such as the Apache helicopter, the Abrams tank, the Blackhawk and CH53E helicopters, the F-404, T-700, T-64, T-55, and T-53 jet engines that power these and the majority of the fighter aircraft in the Department of Defense inventory.

We have 100 employees in the New York metropolitan area. Due to a downturn recently in the Defense spending, we have had to lay off 22 highly skilled workers that has taken us many years to train, and to close a plant in Congressman Flake's district.

The last time I had the opportunity to come to Washington and address the issue of competition was before the OEM-weighted Technical Data Advisory Committee chaired by Eleanor Spector, Director of Defense Procurement in the office of the Secretary of Defense. Despite the imbalance of the group, in that it had very few small businesses represented, specifically one of the things Mrs. Spector at one point stated: "Gentleman, it seems to me that less data means less competition."

I'm here today as a representative of the American Gear Manufacturers Association representing 350 gear companies, of which 95 percent are small business.

As a small contractor and taxpayer, I have been watching as the pendulum has swung from the $500 toilet seats and hammers to full and open competition; and now, regrettably, back again. The spares business that prime contractors were willing to overlook during the defense buildup era has become more attractive to them under the current market conditions.

I would like to put the value of competition in context as it applies to aircraft and engines spares. If you were to take the average passenger vehicle and rebuild it totally using replacement parts, it

would cost three times the price of the original vehicle. There used to be a facetious saying in the aircraft business that they would give you the air frame if you promised to buy all of the spares from them. The motive is obvious.

Any of our small suppliers can tell you that the current mode to restrict competition is the trend. It's the hidden agenda of the OEMs. Somehow, they have managed to line up, thus far, the Government behind them.

Signs of this agenda are evident in many areas. One is in the move to restrict access to technical data, supposedly to encourage OEM developers to continue to work with the Government. Bundling of contracts is another way to minimize competition supposedly to make it easier on the contracting officers, which is a theme that we have heard all morning and in many ways is true. The third symptom is the trend toward imposing unprecedented testing requirements on suppliers supposedly to insure quality.

Maximum practicable competition is not a new idea; it was the exact language prior to the Competition in Contracting Act (CICA). It lead to the abuses characterized earlier as horror stories, which were corrected by CICA in 1984.

My own Senator from New York (Senator D'Amato) referred to the pre-CICA conditions as, quote, "a swamp out there". That was before they found out about the hammers and toilet seats.

The difference is that H.R. 1670 adds definitions such as maximum practicable competition consistent with the need as is defined and best suited under the circumstances. These definitions leave too much discretion to the contracting officer.

Another great concern is Section 101(d), which allows noncompetitive procedures to be used for purchasing property and services when the use of competitive procedures is not "feasible or appropriate". Currently noncompetitive procurements may be made only where there is only one source of a product or a procurement is deemed to be urgent. This change would give too much leeway to the contract officer to find competition unfeasible and inappropriate, whatever that means.

In 1983, the AGMA did its own study to establish the impact of competition on the Defense budget. The general rule of thumb is that we found that savings resulting from competition is anywhere between 25 and 200 percent over sole-source. By applying a conservative savings estimate of 25 percent to the dollars competed by the different buying demands, we calculated that the Department of Defense saved close to $20 billion through competitive processes in 1 year. I think that the exact number $18.6 billion.

This is probably an appropriate time to refresh our collective memories about why "full and open competition" replaced "maximum practicable competition" in the first place. Proponents of H.R. 1670 talk about savings through bureaucratic streamlining, and neglect to consider the impact on the very competition they are seeking to restrict. They are looking at the short-term savings generated by the envisioned cuts in administration. However, when the smoke clears these savings will pale in comparison to the overcharges the taxpayer will be paying *ad infinitum* for spare parts through the life of the weapon systems. As we all know, they are

getting longer and longer and become a requirement of any new system.

To substitute a maximum practicable competition standard for full and open competition and to permit noncompetitive procurements at the contracting officer's discretion is to ignore the primary achievements of CICA: Opening the taxpayer-derived market to small business and reducing the costs to the taxpayers.

In the interests of time, I would direct everyone to the balance of my remarks. I would like to take the time just once again to thank the committee for its time, and certainly its interest. I would be happy to answer any questions.

Thank you.

Chairwoman MEYERS. We appreciate your testimony very much, and I am sure that the committee will have some questions.

[Mr. Forelli's statement may be found in the appendix.]

Our next witness is Aleta Wilson; she will round out our second panel. Aleta has substantial experience with Government procurement of professional and technical services as president or a senior executive with small firms. Aleta is the immediate past chair of the National Association of Minority Business. We are glad to have you with us.

TESTIMONY OF ALETA ROBINSON WILSON, PAST CHAIRPERSON, NATIONAL ASSOCIATION OF MINORITY BUSINESS

Ms. WILSON. Good morning, Madam Chairman and members of the committee. I want to thank you for allowing me to speak with you this morning, I'm honored to be here.

In addition to my business ownership and being the past chairperson of the National Association of Minority Business, I also have spent last year studying the procurement legislation in detail. I have a lot of practical experience, 20 years of practical experience with our procurement system. I'm just learning about the legislative process.

I must say, as I learn more about the process, I become both concerned and pleased. Pleased at a system that allows me to speak before you today about bills that impact our businesses. Then I become very concerned when I read a bill like H.R. 1670 that seems to be written with absolutely no concern for the small business community. I think that we all know that the small business community is the backbone of our economy. So, when I read a bill like this, I become very, very concerned.

I was pleased to hear your opening remarks. It seems as if you and the Chairwoman are aware of some the problems with this bill.

I am all for the free enterprise system and competition. I certainly believe that the current procurement process does need overhaul and I believe that the Federal Acquisition Streamlining Act of 1994 (FASA) went a long way toward improving the system. But I suggest that FASA made such sweeping changes in the system that have not yet been implemented and the regulations aren't even finished being written that we need to slow down. We don't know the effects of those changes and we cannot know the effects until the regulations are fully implemented.

As you know, the majority of the small business community has less than five employees. That means that many of these small

business owners are out there working 60-hour weeks. They don't have time to pay attention to what is going on this way because they are busy putting food on the table for their children. They look to members of this committee and other Members of the Congress and to organizations like mine to protect their interests. It's imperative that we pay attention and go to bat for all of these small businesses. Therefore, I believe that it is our duty to seek this bill not to go into law for the following reasons.

The basis of H.R. 1670 is to eliminate full and open competition. That is just simply wrong, and that's the message that we have been hearing all morning; it has to be stopped. The minority, women-owned and small business community are all taxpayers. They probably pay proportionally more of their revenues into the tax till than large businesses. They need to derive some benefits. They need the opportunity to derive benefits from their taxes. Tax dollars provide the $200 billion that the Government spends for procurement. "Maximum practicable competition" will dramatically reduce our ability to sell to our own Government, which we financed.

I understand that the current procurement process is sometimes expensive, it's lengthy, and it's inefficient. But that's not sufficient reason to bar the small, minority, and woman-owned business community from the process.

Section 35, Contractor Performance, of the current bill restricts our access by requiring contracting with what is termed as verified sources. By putting this kind of language in the bill and leaving the definition of verified sources to the regulators—as we have heard time and time again this morning—is, in my opinion, just absolutely absurd.

The question has to do with what is a verified source. If verification means the company must show a satisfactory past performance, that effectively closes the door to small businesses, especially emerging small businesses, because they don't have any track record. If verification means a small emerging business must show efficiency and effectiveness—right out of the bill—of their business practices, again, they don't have the track record to show that.

Under this type of a verification system, all large contractor companies are guaranteed to be verified sources. Most small businesses are guaranteed not to be verified sources; i.e., small businesses will be barred from doing business with the Federal Government if this verified source system is implemented.

In the issue of debriefing, debriefings are essential to the small, woman-owned, and minority-owned businesses because that is where the lessons are learned. I was pleased to see that the excluded offeror may request in writing, within 3 days after the date on which the excluded offeror receives notice.

Unfortunately, the bill states that the offeror has 3 days to notify the contracting officer that they would like to have a debriefing. Three days is simply an unreasonable amount of time. It sounds so unreasonable that I would hope that someone must have made a mistake. If you look at this and you assume that somebody gets notice on Friday and they are not in their office, 3 days would be up by Monday. If this language stays in the bill, I would suggest

that it must be changed to a minimum to 5 working days or 5 business days.

The other part of this section that is troubling to me is that the Government can refuse the request for debriefing prior to contract award. It's common knowledge that once the contract is awarded, it is very seldom that that contract is stopped. Usually when that happens, it's a large contractor that is in a protest situation who has the dollars to legally bound the system.

Overturning an award takes a lot of time and money. This means that the small, minority, and woman-owned businesses may not have an opportunity receive a contract that they may have been legitimately entitled to receive.

There is another section in the bill, Title III Elimination of Regulations. As I read that, it took me back to my days in elementary school when I had an English teacher that told me the merits to the words "any," "all," and "never;" be very concerned.

The clause says that, "Any certification required by FAR, that is not specifically imposed by statute, shall be removed." I suggest that someone take a look at what all of these certifications are rather than just be moving in certifications. Because someone at some point in time made a decision to put these certifications in, and I suggest that some of them may still be needed.

Section 202 leaves me speechless that the Government would leave the purchase of commercial items regardless of dollar value in the hands of the contracting officers. As a small business owner, I'm locked out unless I know each and every contracting officer in the Federal Government.

As a taxpayer, I am outraged that the Federal Government would provide that kind of latitude to contracting officers. We have already learned from the past that this type of authority leads to broad abuse and the buddy system.

In closing, I again state that I'm pleased to be a part of a system that allows me to voice my opinion, and I implore you to protect the interests of the small, minority, and woman-owned business community; and vote against these sections of the bill that I have talked about this morning.

Thank you, Madam Chair.

[Ms. Wilson's statement may be found in the appendix.]

Chairwoman MEYERS. Thank you very much, Ms. Wilson. I have learned quite a lot this morning and your experience, all of you, contributes greatly to our knowledge.

I think it was Mr. Forelli's comments that bidding as opposed to sole sourcing can result in 25 percent savings.

I believe that you said that, didn't you?

Mr. FORELLI. Yes, I did. But I would rather characterize it, as has been done by several other studies—including ours—that that is the absolute minimum. In my commodity, a whole one of these is a thousand dollars to my OEM customer. When that comes out on the street, so to speak, on public bid, it can escalate in cost by a factor of 10 depending on quantity and several other factors.

But yes, these numbers are real; and please bear in mind they are annualized. CICA has been in effect roughly 10 years and it works out to around $200 billion—with a "B". To me, as a taxpayer, it's staggering. In fact, what we spend on defense is stagger-

ing as a taxpayer, and my stockholders would cut my throat for talking like that, but the fact that there is delta or a price differential, that is that staggering is just that, staggering.

Despite the lower budgetary requirements for defense-oriented products, the thought of going back is, again, just unacceptable as a taxpayer. However much I may or may not benefit as a contractor, as a taxpayer I am the one that is paying it, probably twice.

Again, the only good news is that the overall budget has been so lowered that we don't have the money to spend anymore to sustain a delta like that. So, in 10 years hence the savings, had they gone along the normal path, would only have been $100 billion.

Somehow I managed at one session 18 months ago to call that $200 million, and I was told that was an insignificant amount. I asked the fellow that said that if he would like to step across the street to the White House and explain that to the big fellow that $200 million is insignificant. Now we are talking $200 billion, for the sake of one letter.

But I haven't heard anybody call $200 billion insignificant.

Chairwoman MEYERS. I guess that I haven't been here long enough, since $200 million is still a significant figure to me.

I would call on my colleague, Mr. Poshard, if he has any questions of the panel.

Mr. POSHARD. Madam Chairman, thank you. I don't have any questions. I would like to ask for unanimous consent to submit an opening statement for the record?

Chairwoman MEYERS. Without objection.

Mr. POSHARD. But more than that, I don't have any questions because I don't disagree with any of the positions of the people who have spoken on this bill. I think that the bill has serious problems with respect to going back to the maximum practicable competition.

I know that you, Madam Chairman, have vigorously supported changing that, or at least leaving it the way that it is.

Chairwoman MEYERS. I was astonished to find that they were considering changing it from full and open competition.

We spent, as you will recall, several hours on the floor trying to get a real explanation of why this change was being suggested. The only thing that was ever mentioned was just that it took too long and it was too complicated. I was, I think, as outraged and surprised as what I have heard this morning from the witnesses.

Mr. POSHARD. Thank you, Madam Chairman; I'm certain that the present language in the bill would have an adverse effect on our small business community. I don't support it, I support your efforts to leave full and open competition in the law, and will continue to support that.

Chairwoman MEYERS. Thank you, Mr. Poshard.

I know that several of you have said, and this surprised me a little, that the system needs overhauling. This is before regulations have even been written for the Federal Acquisition Streamlining Act from last year.

How can you know for sure that the system needs overhauling until these regulations are completed? Are there specific—well, I guess that we have had some specific suggestions about what you would like to see changed.

I was surprised even to have this bill introduced this year before the FASA regulations were even written. Would any of you care to comment on that?

Mr. FRANA. As a small business, let me make two comments. One is the implementation of FASA is something that we track literally on a weekly basis. We have probably spent inordinate amounts of money sending people to seminars with the major firms in town actually tracking past implementation trying to understand how it effects how we bid, the bid process, and the affect FASA is going to have in the future.

So we are spending probably an equal amount of time trying to deal with the incoming legislation to find another set of legislation—actually, two bills being introduced this year—to track other reform sets.

As a small business and as what we understand from what we see in the law and regulations, there are still a few areas that still seem to have, or seem to need to be addressed, that are not covered under the FASA legislation. Let me rephrase that. As a small business owner, one would have hoped that the FASA implementation would have been reviewed and evaluated and then legislation structured to solve any problems that had not been solved with FASA.

So this is sort of a double-edged sword to the small business community accommodating current legislation as well as to have to review new legislation being introduced.

Chairwoman MEYERS. You have made comments concerning H.R. 1670.

Are the changes that you would like to suggest incorporated in this testimony?

Mr. FRANA. They are. We support certain areas of H.R. 1670. Yes, they are incorporated more in the written statement than the oral presentation in that we had to cut down. In the written submission, they are addressed, yes, Madam Chair.

Chairwoman MEYERS. Ms. Wilson?

Ms. WILSON. Yes, Madam Chair. I would like to comment on two of the things that you said. You questioned the fact that the system needs to be overhauled, from the small business standpoint. I think that one of the reasons for making changes to the system is right now, the procurement process takes too long.

My company and most of the companies in our association are information technology firms. The procurement cycle is an average of 2 years, which is too long, both for the Government and the small business community. The small business can and does go out of business waiting for procurement. So, there needs to be some changes in the system to reduce that amount of time that it takes to get a contract awarded.

The problem with implementing this bill or even suggesting this bill so soon before FASA is fully implemented is that not only does the small business community not know what is in the bill and how it's going to impact them, the contracting officers don't know. When I talk to contracting officers about FASA they all kind of know about it, but they don't really know what it contains, and it's not implemented.

So H.R. 1670 is definitely moving too fast, and I don't know why they are trying to get this bill enacted so soon.

Chairwoman MEYERS. I have one more question and then I'm going to turn to my colleague, Mr. Chrysler.

One of the objectives of H.R. 1670 is supposedly to curb, quote, "excessive competition," leaving the impression that hundreds of offers are being received. But no studies really have substantiated these claims.

What are your experiences?

Ms. WILSON. When the Government publishes a notice soliciting bids, they do get hundreds of companies that request the RFP (Request for Proposals). But in terms of actual bidders on the contract, they could get 100 people requesting the RFP, but only get five bids.

So it depends on what numbers the people are looking at when they talk about the numbers the people bidding. The actual bidders are much fewer than those that request the RFPs.

Chairwoman MEYERS. Thank you. Any comments, Mr. Forelli?

Mr. FORELLI. In our case because of the critical/life support nature of the product that our industry manufactures, there are what appears to us to be far more bidders then there really should be, knowing who is qualified and who is not. But there are processes in existence today that are used that we work with everyday to eliminate those kinds of people. They seem to work somewhat efficiently.

I would agree with you that there are probably more requesters than there are bidders. But nevertheless, there are avenues that the uninitiated can take and are generally precluded from it, at least in our product line, because of its critical nature. The systems in effect now are called Source Approval Requests, and seem to pretty much weed them out.

Chairwoman MEYERS. Is there any way that the procurement officer, just through outlining specifications or requirements more carefully, could narrow the number of people so you wouldn't have, maybe, excessive competition?

Ms. WILSON. In our field, the professional services side, that is always done. The RFP clearly states what the needs are. That is why, again, 100 people requesting the RFP and only five people actually bidding, because once they see what the specifications are they know that they are not qualified to bid.

So in the professional services side, that's handled through the RFP.

Chairwoman MEYERS. Thank you. Do you have any comments?

Mr. FRANA. On the hardware integrations side of the field, we look at and track RFP's that come out. I will agree that the first list of bidders are substantial, anywhere from 25 to 100 companies. On major deals, it usually boils down to less than a handful of people who are actively participating and bidding on the process by the time that you get to the RFP truly being evaluated. On smaller transactions, you may have two handfuls, but it's very rare to see more than five or six bidders. So, from the standpoint of the amount of the people participating, there is a lot of people looking at it to qualify whether or not they can do it, and then it drops down to the active players for that segment of the market.

Having said that, the Trail Boss Program that the General Services Administrator has instituted for GSA's major procurements, there have been some phenomenal successes under the Trail Boss Program: Doing a better job of defining requirements, defining exactly how it's going to be evaluated, and being much clearer in the process of actually managing the RFP.

So there has been endeavors to try and strengthen the RFP process so it eliminates some of the confusion.

Chairwoman MEYERS. Thank you. Mr. Chrysler?

Mr. CHRYSLER. Madam Chairman, I don't really know if I have any particular questions of these particular witnesses.

I would like to suggest that we talk to or maybe hear from some buyers in both the private and public sector so we can talk to them from a first person perspective of some of the things that they see when people try to deal with the Government. Try to get a feeling on the floor on that side of it.

Chairwoman MEYERS. Thank you. Mr. Chrysler.

I think that concludes our hearing. I would ask unanimous consent that the record of the hearing remain open for the statements by committee members and other Members until Tuesday, July 12, 1995.

I wish to thank you all again, very much; and we are adjourned.

[Whereupon at 12:02 p.m., the committee was adjourned, subject to the call of the chair.]

APPENDIX

Statement of Representative Eva Clayton
House Small Business Committee
Small Business Participation in Federal Contracting
Assessing H.R. 1670, The Federal Acquisition Act of 1995
Public Hearing
June 29, 1995 - 10:00 a.m.

Madame Chairman, This is an important hearing. I believe it is vital that we take a close look at H.R. 1670, The Federal Acquisition Act of 1995. This eighty-five page proposal affects some two hundred billion dollars in goods and services to the federal government. It is a significant piece of legislation.

There are some troubling provisions in H.R. 1670, not the least of which is found in Title One, Section 101, wherein the "full and open competition" standards of the law are changed to a "maximum practicable competition" standard. This new standard, by virtue of its own definition, may well put small and medium sized businesses at a decided disadvantage, while putting large businesses and major corporations at a decided advantage. Consequently, the aim of reducing costs could very well be missed in the face of reduced competition and effective monopolies. Indeed, the Competition in Contracting Act, enacted in 1984, a law that has served us well for more than a decade, was enacted to eliminate soul-source contracting and the awarding of contracts on a less than competitive basis. A commercial-like process, a stated goal of the bill, is best achieved through free, fair and open competition, "full and open competition."

The provisions regarding "verification" are equally troubling. Under H.R. 1670, the government will have the power to decide, through the process of developing and keeping lists, who can and who can not compete for government contracts. That is a dangerous arrangement. And, while I am certain that it is not the intent of the drafters, the effect of this "verification" process is to create a command economy, not unlike those found in governments controlled by the military, rather than a demand economy, to which Americans are accustomed. Perhaps most troubling about the "verification" process is its ambiguity. What does "verification" really mean. Does it mean only companies with a past record of performance will be allowed to participate? If so, that will exclude many companies that may well provide the best products and services at the least expensive prices. It would certainly exclude many women and minority companies that have not had the same opportunities and access to government procurement programs that other companies have had. The small and new company would have little or no opportunity to flourish.

The Bill, at Section 104, makes a faint attempt at fairness, by allowing a debriefing of excluded bidders. The problem with that Section is that the excluded business has only three days to request a debriefing and, worse yet, the government can elect not to provide a debriefing. Thus, in highly sensitive situations the debriefing

may become an empty gesture, giving way to expediency and closed rather than open processes.

Another troubling sign is the provision found in Section 202 of the Bill that would allow the use of "special simplified procedures" for the purchase of commercial goods, at any dollar amount. That puts far too much power in the hands of a few contracting officers, who will have the ability to spend millions, even billions of dollars, without any strict guidelines and without the competitive process. That kind of free-wheeling exercise of power can only breed great difficulties and encourage abuse.

I, therefore, look forward to this hearing, Madame Chairman, with great anticipation. The provisions of H.R. 1670, The Federal Acquisition Reform Act of 1995, are too sweeping and far reaching for anything except close and careful scrutiny. This hearing begins to give us and the public that opportunity.

STATEMENT OF REP. CARDISS COLLINS
before the
SMALL BUSINESS COMMITTEE
Hearing On
Small Business Participation in Federal Contracting:
Assessing H.R. 1670, the "Federal Acquisition Reform Act of 1995"
June 29, 1995

Madame Chair, I commend your leadership in convening today's hearing to consider the impact of H.R. 1670, the Federal Acquisition Reform Act of 1995, on small business. H.R. 1670 was introduced by Chairman Clinger of the Government Reform and Oversight Committee and Chairman Spence of the National Security Committee. It seeks to continue the modernization and streamlining of Federal acquisition procedures begun with the bi-partisan enactment of the Federal Acquisition Streamlining Act of 1994 last October.

As ranking Democratic Member of the Government Reform and Oversight Committee, I share your concern that the departures from current Federal procurement policies and procedure as prescribed by H.R. 1670 raise critical issues as they relate to small business participation in Federal contracting. When provisions of this bill were considered on the floor two weeks ago in the form of an amendment to the National Defense Authorization Act, you crossed the aisle to support my amendment protecting the rights of small business. The passage of my amendment is indicative of the bi-partisan spirit with which acquisition reform should be undertaken. I am pleased to join you here today in that spirit.

As you know, a major provision of H.R. 1670 would replace the current "full and open competition" standard mandated in the Competition in Contracting Act of 1984 with a "maximum practicable" standard. It would permit contracting officers to independently establish the competitive range for each procurement, and thus limit certain businesses from consideration for government contracts.

This is a fundamental departure from long-standing Federal procurement philosophy as well as the basic principles of free enterprise. I question whether it will accomplish the cost-saving goals sought by the the authors of the measure. Even more importantly, I question whether those goals should supersede the rights of the private sector, and in particular, new and small businesses, to compete for Federal contracts.

It is true that many government contractors are spending large sums of money bidding on government contracts for which they have no chance to win, and that contracting officers are overburdened evaluating bids that are essentially non-competitive. H.R. 1670 attempts to solve these problems by detouring from the road of full and open competition and into the uncharted wilderness of something called "maximum practicable" competition. In the Government Reform and Oversight Committee's only hearing on this bill, several witnesses expressed strong misgivings about adopting a "maximum practicable" competition standard, a term which defied a common interpretation. Little was offered by way of a specific proposal as to how the objective of this new and ambiguous standard might be attained, namely, facilitating the process for the contracting officers while giving offerors enough information for their own assessment of chances for award.

I have crafted language that successfully confronts these problems but preserves opportunities for small businesses. It makes government procurement practices more like the private sector, where buyers and sellers talk to each other. It increases the dialogue between government agencies and firms bidding on government contracts, and gives clear authority to contracting officers to exclude businesses which have no chance of winning government contracts.

On June 14, in floor action on the National Defense Authorization Act, the House voted to adopt my amendment to the previous amendment offered by Chairman Clinger, National Security Chairman Spence, and Budget Chairman Kasich which, among other things, would have replaced the Competition in Contracting Act's (CICA) full and open competition standard with a new maximum practicable standard. My amendment retained the full and open competition standard which has been the norm since CICA was enacted in 1984.

Additional modifications to the Clinger-Spence-Kasich amendment that were suggested by me and by the ranking Democratic Member of the Government Reform and Oversight Subcommittee on Government Management, Information and Technology were achieved prior to floor action. In general, these modifications allowed for the increasing decentralization of procurement authority and elicited greater cost-effectiveness for the Federal government and the taxpayer. The House approved the modified version of the Clinger-Spence-Kasich amendment, as amended by my full and open competition amendment, by a vote of 420-1.

Chairman Clinger is to be commended for his efforts to continue the modernization and streamlining of Federal acquisition procedures. I am particular appreciative of his efforts to reach a consensus with Democratic Members of the Government Reform and Oversight Committee on procurement reform legislation. I expect that these modifications will be carried forward in his legislation if H.R. 1670 is marked up in the Committee of Government Reform and Oversight.

Chairwoman Meyers, I thank you for your vision and advocacy on behalf of small business as we address these complicated and difficult issues. I look forward to working closely with you toward fair and meaningful acquisition reform that preserves the principles of free enterprise for all of our citizens.

Statement of
The Honorable John J. LaFalce

Committee on Small Business
Hearing on the
Federal Acquisition Reform Act of 1995

June 29, 1995

Thank you, Madam Chair, for calling this hearing to assert the rights and hear the concerns of the small business community with regard to the Federal Acquisition Reform Act of 1995.

This legislation has several provisions that, despite its sponsors' assurances to the contrary, will more than likely have a significant negative impact on small business owners' opportunities in and access to the federal marketplace. The replacement of full and open competition with maximum practicable competition and the authorization of simplified acquisition procedures for commercial items of any dollar value are probably the two most egregious provisions.

I must also express today my dismay with the fact that, in addition to hurting small businesses substantively, this bill has bypassed the small business community procedurally. It was not referred to this committee although it affects parts of the Small Business Act; the one hearing that was held by other committees was held so quickly after the bill's introduction that small business advocates had insufficient time to prepare testimony; and then, without further committee action, the bill was adopted earlier this month, in amended form, as part of the Department of Defense authorization bill. The rush to pass this bill is, in my view, ill-considered. Last year's Federal Acquisition Streamlining Act has not even been implemented, much less assessed for whether additional changes in the procurement system are needed.

Madam Chair, I applaud your leadership on this issue. Your support helped restore the

full and open competition standard to the version of this bill which is now part of the DOD authorization bill. Your leadership will certainly be needed again if this bill -- with the maximum practicable competition standard -- does proceed to mark-up elsewhere. I will be happy to work with you and other members of this committee to ensure that small business owners have a say on this very important issue.

All of today's witnesses have a great deal of experience and expertise in government contracting and I look forward to hearing their comments on the provisions of H.R. 1670 and its impact on small businesses if passed.

Thank you.

Committee on Small Business
U.S. House of Representatives

Hearing
on
SMALL BUSINESS PARTICIPATION IN FEDERAL CONTRACTING:
ASSESSING H.R.1670, THE "FEDERAL ACQUISITION REFORM ACT OF 1995"

June 29, 1995
10:00 a.m.

OPENING STATEMENT

Rep. Jan Meyers
Chair

Today, the Committee on Small Business meets to receive testimony assessing the provisions of the proposed "Federal Acquisition Reform Act of 1995", H.R. 1670, and the effect they would have on the ability of small firms to compete for Federal contracting opportunities. Although this bill was the subject of a May 25th hearing, jointly conducted by the Committees on Government Reform and Oversight and National Security, representatives of the small business community were unable to testify due to inadequate time to analyze this 85-page bill. Today, this Committee will afford representatives of various segments of the small business community, and others, another opportunity.

If enacted in its present form, H.R. 1670 would fundamentally alter the Federal procurement process, but not in way intended by its sponsors. Rather, analyses suggest that the resulting Federal procurement system would likely be substantially less open and fair, would invite more non-competitive contracting, and cause small firms to have to confront additional obstacles to their participation. In short, a procurement process that diminishes the ability of small firms to sell to their own Government.

H.R. 1670 proposes that we abandon the standard of "full and open competition", established by the landmark "Competition in Contracting Act of 1984" (CICA), and return to the pre-CICA standard of "maximum practicable competition". Further, as drafted, the bill would leave to the career regulation writers the definition of "maximum practicable competition". The bill would also eliminate the system of "justifications and approvals" that have worked for a decade as an effective restraint on unjustifiable sole-source contracts.

H.R. 1670 would permit the use of "simplified procedures" for purchasing "commercial products", without any dollar limitation. Today, these simplified procedures, which are specified only in regulations, can be used for "small purchases", contracts of $25,000 or less. Under last year's sweeping "Federal Acquisition Streamlining Act" (FASA), simplified procedures will be available for purchases of up to $100,000. These procedures encourage contracting officer to solicit offers telephonically and allow three calls to constitute "competition". Some of today's witnesses have testified before this Committee and other committees of the House and Senate that such regulatory authority for "three telephone call competitions" violates the Small Business Act.

In fact, H.R. 1670 would repeal, as duplicative, the very provisions of the Small Business Act that ensure adequate notice of contracting opportunities and adequate time for small firms to fashion an offer. These statutory protections for small firms have been part of the Small Business Act since 1983. They have been retained through every round of procurement legislation, from CICA in 1984, to FASA, a decade later.

H.R.1670 would also repeal statutory provisions that assure an open and fair process for the prequalification of contractors. Adopted in the mid-1980s during the DOD spare parts "horror stories", they protect small firms from arbitrary exclusion from competitions. H.R. 1670 would substitute a new contractor "verification" system. Again, the processes, and any protections, are left to the regulation writers. Essentially, a return to the practices that gave rise to the abuses.

These are some of the concerns that will be raised by today's witnesses. We will also hear about the good provisions of H.R.1670, which rightfully should be acknowledged.

The sponsor of the legislation, my good friend from Pennsylvania (Mr. Clinger), the Chairman of Committee on Government Reform and Oversight, wants to understand the concerns of the small business community. I intend to make available to him the record of this hearing and subsequent hearings on the implementation of FASA. I intend to continue to work with him to modify his bill as he moves to mark-up in his Committee, so that the reported bill reflects needed changes. If need be, I will subsequently pursue additional changes on your behalf.

A modified version of H.R. 1670 was attached to the House-passed version of H.R. 1530, the "National Defense Authorization Act for Fiscal Year 1996". According to its sponsors, its purpose was to force action by the Senate. It has been described by its sponsors as a "placeholder", subject to further modification as H.R. 1670 moves through consideration by various committees. The amendment already reflects important modifications to address key concerns of the small business community. These modifications, which upheld the "full and open competition" standard, were sponsored by Rep. Cardiss Collins, the Ranking Democrat on the Committee on Government Reform and Oversight. They enjoyed bipartisan support, including my vigorous support. A key concern that I had was that the views of the small business community were yet to be heard.

I look forward to the additional information that will be provided by today's testimony. If the interests of small business government contractors are to be preserved, it is essential that your concerns be thoughtfully expressed, and then needed changes vigorously pursued. As your advocates in the House, the Committee on Small Business will try to do our part.

Congress of the United States
Washington, DC 20515

Committee on Small Business
The House of Representatives

Opening Remarks
of
The Honorable Glenn Poshard

June 29, 1995

Thank you Chairwoman Meyers for holding today's hearing assessing the small business community's participation in federal government contracting. I think it is vital this Committee look closely at the role the Federal Acquisition Reform Act of 1995 can play in bringing new contracting opportunities to small businesses and manufacturers.

I was pleased that earlier this month the bill was adopted in amendment form to the Department of Defense authorization bill. I was equally grateful that with the support of this Committee's Chairwoman and its members, Representative Collins of Illinois added an amendment to restore the full and open competition standard and to encouraged dialogue between agencies and business by providing for conferences to bids and proposals. I believe Representative Collins' amendment was critical to maintaining the participation of small business in the contracting process.

Thank you to those appearing before the Committee today, and please know I look forward to hearing from each of you. I hope that through our dialogue today we can work toward expanding the small business community's role in government contracting.

TESTIMONY BY WILLIAM F. BLOCHER, JR.
BEFORE THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON SMALL BUSINESS
JUNE 29, 1995

MADAM CHAIRMAN and distinguished members of the committee, thank you for the opportunity of testifying on H. R. 1670, Federal Acquisition Reform Act of 1995. Today, I am addressing you as an individual and a small businessman and not as a representative of any of corporation, industry association or community organization which I now serve or have served in the past. My earlier business background involves fifteen years of experience in building a small family printing and micrographics company doing business in the commercial and government markets. For the last fourteen years I have been in the information technology industry serving seven years with a large government contractor; and the last seven years helping to build three different small businesses into multi-million dollar government services contractors. Since 1984, my primary information technology management function was and continues to be strategic business development in the federal government market.

From a personal point of view there are many laudable recommendations in the Bill. The most important one is the clear, strong statement supporting the position that the government should rely on the private sector for needed goods and services. Other good features include the establishment of a consolidated United States Board of Contract Appeals; moving the protest forum out of GAO into the executive branch; repealing some of the onerous Procurement Integrity statutes and their replacement with broad protections of source selection and proprietary information to permit open communications between the government buyer and industry seller; changes to commercial item cost and pricing data, post-award audits, and cost accounting standards; and, the use of Alternative Dispute Resolution to settle differences faster and cheaper.

The potential of the changes noted above, plus the remarkable and thoughtful changes made by the Federal Acquisition Streamlining Act of 1994, have significantly improved the climate of doing business with the federal government. I would particularly like to single out the actions of Joe Thompson, Commissioner of GSA's Information Technology Services for his foresight in challenging the business community to work with his agency in improving communications between government and industry. This effort led directly to the improvement in debriefings as well as opening up the flow of critical information

between buyer and seller; and has reduced and will continue to reduce the number of procurement protests in the future. Additionally, I would like to go on the record in support of retaining the Brooks Act and the Competition in Contracting Act (CICA). Without these two critical pieces of legislation, the dynamic information technology industry that serves the federal government today would not exist. Instead, you would have a semi-closed circle of contractors and vendors with the market strength to restrain new entries, especially small businesses.

MAXIMUM PRACTICABLE VERSUS FULL AND OPEN

What troubles me about the Bill is contained in TITLE I - COMPETITION under Section 101 where the "full and open competition" provisions of the Competition In Contracting Act (CICA) are changed to a "maximum practicable competition" standard or objective. This change gives the government bureaucracy too much power in restricting competition in one of our nations most competitive markets --- providing over $200 billion worth of goods and services to the federal government. As this implications of this provision become known a chill will settle over all but the largest industrial members of the government contracting community. This modification, if enacted, cannot help, but inevitably hurt, small and medium-sized businesses. In all likelihood, its intended effect of eliminating competition will impact the smaller, newer small business attempting to break into a market already dominated by an preponderance of large corporations.

I am wary of proposals to remove regulatory burdens that are promulgated or supported by government regulators and government procurement officials together with large corporations. When I run into this type of proposal I ask myself, Why? We have been told in other testimony that the cost of procurement administration may outweigh the benefits of full and open competition. We have been told that the complexity, and high transaction (buyer) costs, and user (government employee) dissatisfaction require that we reduce the number of potential bidders. I am disturbed when this rhetoric is coupled with statements of a desire for a federal government that costs less and is efficient, flexible and responsive. Democracy is inherently not efficient. The "maximum practicable competition" clause gives government officials too much power over business decisions. Full and open competition is efficient and only hurts those who are truly not competitive. Anything less than full and open competition, artificially restrains trade and hurts the smaller companies disproportionately.

I reviewed the comments of the Acquisition Reform Working Group (AWRG) presented on May 25th to the Committee on Government Reform and Oversight. Knowing their members and the overwhelming makeup of the member associations which are disproportionally financed and controlled by the larger corporations, I respectfully question whether they are really interested in preserving competition or are they merely exercising their rights to support what is clearly in their best interests...limited competition. I ask you whom will benefit, if we go back to the days of sole source contracts and a closed circle of buyers? Not the little businesses, not the start-up corporations!

One of the most important goals that the 104th Congress has favored is to obtain maximum value for the taxpayer for the services of government. This philosophy encourages concepts leading to minimum transaction costs for purchasing, calls for streamlined, value-oriented competition, and concerns over the cost of conducting unlimited competition. However, we must be willing to recognize the trade-offs involved. Do we really want to reduce competition for the government's purchases? I think not! There are other public policies which must be placed on the scales; those that should call for fairness in allowing all companies to compete for public contracts that use public tax moneys; and those that encourage new companies to enter the marketplace to ensure innovation and sharpen the competitive edge of the existing suppliers.

Industry and Government data already indicates that the government awards many large Defense contracts as sole-source. This money is public money. The Government while benefiting from adopting some commercial practices that promote efficiency, is dealing with public money and public trust. There is still a requirement for public accountability for use of public funds. Maximum practicable competition is potentially a return to the old pre-CICA process of awarding to companies that the government agency staff knows; and not necessarily to the most innovative, or to the best value, and/or to the lowest priced offeror. We have also had suggestions that appropriate protections be provided for excluded companies that the agency did not permit to compete. That suggestion would be another legislative, regulatory Band-Aid applied as the direct result of not permitting full and open, free enterprise competition in the market for providing government services. Why are we creating a problem by killing the competitive process? Let the free enterprise market process work! We don't have too much competition. Don't fence me out with exclusionary regulations!

FACNET AS A SIDE ISSUE

In discussions with other government procurement officials, I have heard voiced a number of concerns regarding FACNET: Will it transform the current cumbersome paperwork process? Will it reduce staff time for all parties? Will it substantially reduce transaction costs? Or will it inundate the government with hundreds of bids under the $100,000 purchase threshold that statistically make up 80% of government purchases? The procurement officials are rightfully concerned, and funding, as well as new policies, processes and procedures will need to be developed if the new automated procurement approach is to be successful. Is this potential concern one of the drivers to reduce competition from full and open to maximum practical competition?

FACNET is a good idea that will bring with it new problems. They can be solved along with the related issues of not allowing protests below $100,000. But, there still needs to be some oversight! What protections are there to fraud and abuse within the government? How do you handle debriefings for an electronic procurement? How will you provide for accurate, timely, contractor verification of performance? The ability to qualify bidders is conversely the ability to disqualify bidders. How will FACNET handle this problem? Many questions remain to be resolved.

THE PROTEST PROCESS

Some still feel we need to further simplify and to resolve disputes and protests in the selection process with increased flexibility. As a small businessman, I encourage you to take a careful look at the many proposals which would weaken the oversight function underlying the procurement protest process. In my opinion, a strong bid protest forum is essential for oversight where the expenditure of public funds is involved. While there need to be some improvements, in this time of great changes at the federal level of government, we need to go slowly especially when we are removing oversight protections against fraud and abuse of authority. The Government needs to understand that industry does not automatically presume agency correctness; especially, with the overwhelming evidence of misconduct and mistakes uncovered during GSBCA protest actions over the past years. Too much is at stake in the procurement process to allow our industry to make that kind of assumption.

In my mind, it does not make sense to require deference to an agency decision and to permit the agency to continue with the awarded, protested contract, as some have proposed;

especially in the face of evidence that demonstrates that the decision might have been unlawful or unreasonable. If obeying statutes, rules, and regulations stifles some kinds of decision making and causes risk-adverse behavior, that is an acceptable cost of doing business for the government and a wise expenditure of taxpayer dollars.

Any changes proposed in the statutes, rules, and regulations should improve the protest process while retaining the industry's confidence in government's integrity and fairness to all parties. The acquisition process and its management, not the protest process, lead to less creative solicitations, less leading edge technology, and less than optimum results.

The evaluation of multiple, voluminous proposals, for complex and not fully understood technology and services, cannot be made simple or error free. In most Government acquisitions, evaluators have had little prior experience in participating in a major evaluation effort. Errors that can lead to the selection of an offeror other than the one that would provide the "best value" to the Government can be expected and do occur.

Unless the Government can substantially reform the acquisition process so industry has some assurance that significant errors will not occur, industry needs some mechanism like the protest process for recourse in order to justify the risk inherent in the great expenditure of resources in the development of proposals.

Prior studies of GAO and GSBCA decisions have shown that the courts, the GSBCA, and the GAO do not disturb agency procurement decisions and uphold over 90 percent of the awards when applicable statutes and regulations provide agency discretion in making a procurement decision. Neither the GSBCA nor the GAO forum substitutes its independent judgment for the authorized judgments of the agency. In fact, the courts, the GSBCA, and even the GAO only review an action when a violation of statute, regulation, or other mandatory requirement is alleged and/or found.

The yardstick by which agency actions are judged is the evaluation criteria defined by the agency in the RFP. Furthermore, on matters committed to agency discretion, the GSBCA requires the protester to show that the agency's decision lacked a reasonable basis and will uphold the agency where such a reasonable basis does exist.

Further, the Government does not take into account the fact that the oversight process provided by the protest forums provides a reasonable and equitable basis for industry to determine if the Government acted with integrity and fairness in the procurement process. A review of GSBCA decisions over the last 8 years shows that the nature of the protests

has changed as Government agencies have improved their procurement processes, contracts, and have developed a better understanding of how Government agencies are required to evaluate proposals—especially in "best value" procurements.

The protest process, especially as implemented at the GSBCA with the full development of the record concerning the evaluation process, has resulted in measurable improvement in the Government's compliance with the FAR. Also, increasingly open communications before, during, and after the procurement, especially with better debriefing procedures enacted by FASA, gives credence to the potential reduction of litigation and protests that is already apparent based on quantifiable data from GSA procurement reports.

OTHER CONCERNS

Congress should carefully review any "simplified procedures" suggested by this Bill. The FASA provided a reasonable approach with certain dollar ceilings. Let us work within these guidelines and not take the ceilings off, and not take the "adequate notice" provisions out of the regulations. Commercial buyers have the authority to make these types of commitments, but they are accountable to their owners and to the sources of the capital funds that they spend. The new contractor "verification" system also concerns me in that without significant protections written into the law this kind of system could lead to exclusionary practices. Industry needs time to assess the impact of FASA's past performance initiative before jumping into an even more restrictive approach of qualifying bidders.

In closing, I would particularly like to thank the Chairman and the Committee for taking the time to address the matters proposed in H.R. 1670, particularly as they relate to and impact small businesses. I know that you understand the critical economic importance of the small business to America's economy. Please keep the "full and open" provisions of CICA alive and well! Thank you, for taking the time to listen to my point of view.

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Hearing before the

United States House of Representatives
Committee on Small Business

Testimony of

Matthew S. Forelli
President
Precision Gear, Inc.
Corona, New York

on behalf of
The American Gear Manufacturers Association
Alexandria, VA

June 29, 1995

Thank you, Madam Chairman and distinguished members for scheduling a hearing on this topic of great importance to many small manufacturers.

My name is Matt Forelli and I am President of Precision Gear Inc., in Corona, New York (Queens). For 58 years we have manufactured the flight safety critical high precision gearing purchased by the Department of Defense for its weapons systems such as the sample you see before you. Our gearing products are integral parts of the air frames and drive systems as well as the engines that power them, including the Apache helicopter, the Abrams tank, the Blackhawk, the CH-53E, and the F-404, T-700, T-64, T-55 and T-53 engines. Precision Gear Inc. employs 100 people in the New York metropolitan area. Due to the downturn in the defense market we recently laid off 22 highly skilled workers and closed a plant in Mr. Flake's district.

The last time I had the opportunity to come to Washington to address the issue of competition, it was before the OEM-weighted Technical Data Advisory Committee chaired by Eleanor Spector, Director of Procurement for DoD. Despite the imbalance of the group (very few small business representatives) the chairman made the comment that it seemed to her that "less data means less competition."

I am here today as a representative of the American Gear Manufacturers Association, the trade association representing 350 gear companies. Our membership is 95% small businesses, and many of us participate in the break out program.

Madam Chairman, I am the second generation to own my company, and I intend to pass it on to my son and my grandchildren. The bill under consideration today, HR 1670, could jeopardize those plans and the future of the employees of Precision Gear.

I won't attempt to address every item of HR 1670, but will focus primarily on the importance of free and open competition.

As a small contractor, I have been watching as the pendulum has swung from the $500 toilet seat to full and open competition and now back again. The spares business that prime contractors were willing to overlook during the defense build up has become more attractive to them under current market conditions.

I'd like to put the value of competition in context: if you were to take an average passenger vehicle and rebuild it totally using replacement parts, it would cost three times the price of the original car. There used to be a facetious saying in the aircraft industry that if the buyer would agree to purchase all the necessary spares from the company, they would throw in the airframe for free.

My point here is simple: spare parts are a lucrative business if you can control the competition.

Any small supplier can tell you that the move to restrict competition is **the** trend. It is **the** hidden agenda. Signs of this agenda are evident in many areas:

- One is the move to restrict access to technical data, supposedly to encourage developers to continue to work with the government. The result will be less data for small businesses to use to manufacture spare parts under the break out program. Blueprints now have legends and "stripes" which have only begun to appear reminding the supplier that the data can only be used to manufacture for the prime contractor.

- Bundling of contracts is another way to minimize competition, supposedly to make it easier on the contracting officers.

- A third symptom is the trend toward imposing unprecedented testing requirements on suppliers (supposedly to ensure quality). The recently rescinded "test" rule at the Army Aviation Command in St. Louis stated that even if a company had previously manufactured the part for ATCOM, it must be subjected to testing at an average cost of $125,000 per part, added to the value of the contract. Which companies, Madam Chairman, do you think were able to afford that test, large or small?

Maximum practicable competition is not a new idea, it was the exact language prior to the Competition in Contracting Act. *It led to the abuses corrected by CICA in 1984.* The difference is that HR 1670 adds definition such as maximum practicable competition "consistent with the need" and "best suited under the circumstances." These definitions leave much too much discretion up to the contracting officer. Another grave concern is Section 101 (d), which allows noncompetitive procedures to be used for purchasing property or services when the use of competitive procedures is not "feasible or appropriate." Currently, noncompetitive procurements may be made only when there is only one source for the product or when the procurement is deemed to be urgent. This change would give too much leeway to the contracting officer to find competition "unfeasible or inappropriate."

Many studies have documented savings through competition. Back in 1993 we did our own study at AGMA to establish the impact of competition on the defense budget. We contacted the Army, Air Force, Navy and Defense Logistics Agency, requesting their records on dollars competed and percentage of buys competed. The general rule of thumb is that savings resulting from competition is anywhere between 25 and 200 percent over sole sourcing. One study by the Air Force demonstrated that the first time competition is introduced in a procurement, savings averages 25%; the second time it jumps to 28 to 30%. By applying a conservative savings estimate (25%) to the dollars competed by the different buying commands we calculated that DoD alone saved close to **$20 billion** through competitive processes in one year. Realistically, the number is probably much higher.

This is probably an appropriate time to refresh our collective memories about why free and open competition replaced maximum practicable competition in the first place.

The following examples come from former competition personnel at Kelly Air Force Base. In one example, two independent contractors (small companies) were providing a flame holder for the F-100 engine to the Air Force for about $5,000, depending on the size of the buy. When the Air Force restricted the purchase to the prime contractor they began paying $15,000 to $16,000 per flame holder. As an addendum, one of the two small companies is now out of business.

Before 1985, sources other than the OEMs did not have a fair opportunity to compete. For years Kelly bought thousands of parts called a "divergent nozzle segment" for the F-100 engine at a unit price of over $2,400. When competition was introduced the price dropped to $1,234. Even the prime contractor's bid, although not low, dropped $1,000 per unit.

And yet, proponents of this legislation talk about savings through bureaucratic streamlining, and *neglect to consider the impact of the very competition they are seeking to restrict.* They are looking at the short term savings generated by envisioned cuts in administration. However, when the smoke clears the savings will pale in comparison to the overcharges the taxpayer will be paying *ad infinitum* for spare parts -- through the life of the weapons systems. And lives of weapon systems seem to be getting longer and longer these days.

To substitute a maximum practicable competition standard for free and open competition and permit noncompetitive procurements at the contracting officer's discretion is to ignore the primary achievements of CICA: opening the taxpayer-derived market to small businesses and reducing the cost for that same taxpayer.

In theory, the concept of maximum practicable competition should work. Reality, however, is another thing. Under current practice, companies such as ours qualify to make a part through the Source Approval Request (SAR) process. Through this process we prove to the purchasing agency that we have previously made the part or a justifiably similar part. The SAR process is open to everyone; it screens out the unqualified and leaves the real competition to the few qualified bidders.

Again, the risk in maximum practicable competition is that it leaves too much discretion to the contracting officer. Put yourself in his shoes -- he's got a desk full of paper he needs to move. Given the leeway, he or she will take the shortest, easiest route to getting the job done: call his regular contacts, often the established OEMs (large companies). That's just human nature, and to assume otherwise is naive. It is difficult to imagine the small companies, and the newcomers to the market winning in that scenario, even when they are well qualified.

The concept of creating a class of verified contractors is troubling to us for the following reasons:

- It is unclear to us how this is different from current practice of having lists of qualified producers under the SAR process; if the intention is to eliminate qualified bidders lists, we are strongly against it.

- A system created to repetitively utilize the same companies for products would by its very nature be biased against new entries and would not yield effective--or fair--competition.

- HR 1670 requires the head of an executive agency to use competitive procedures to verify contractors as eligible for contracts. It is very important that the prime contractors **not** be the verifiers.

- Under the Certificate of Competency program contained in the Small Business Act SBA makes the final determination of small businesses' capabilities to perform. We believe strongly that the responsibility should continue to be the jurisdiction of the SBA.

Another popular rationale for this legislation is that the Federal government needs to buy like a commercial entity. We heard that over and over again during the FASA debate last year. I'm here today to send a message back to the sponsors: Federal procurement as it relates to the critical aircraft spares industry of which we are apart is not a "commercial-type" process because *it is a purchase made with taxpayer dollars.* Dollars paid by my employees -- working on machinery hour after hour, day after day, year after year. Why don't they have a shot at the business generated through their tax dollars -- because the government wants to operate more like a profit-making corporation? Maybe the sponsors of this bill would like to come up to Queens to hand out the pink slips when we have to lay people off because free and open competition is restricted.

In closing, I would like to remind the committee that the Competition in Contracting Act accomplished three fundamental principles of DoD procurement:

- It saved DoD money;

- It maintained quality; and

- It proved to the American public that DoD could provide responsible stewardship of the taxpayers money.

HR 1670 would undermine much that was accomplished by CICA, so my message to you today is: **please think carefully before you dismantle those accomplishments.**

Again, I congratulate the committee for stepping into this process and ensuring that small businesses get a fair hearing on their side of these issues. I would be happy to answer any questions any of you may have.

TESTIMONY OF TOM FRANA
President, ViON Corporation
before the
Committee on Small Business
U.S. House of Representatives
on
H.R. 1670
The Federal Acquisition Reform Act of 1995
June 29, 1995

Madam Chairman Meyers, Ranking Minority Member La Falce, and other distinguished members of your committee, thank you for the opportunity to express some of my concerns with H.R. 1670, a bill that could fundamentally alter the procurement process.

Let me first take a moment to preface these remarks with a brief description of ViON, so you can see why H.R. 1670, the implementation of FASA I and the Senate Information Technology Management Reform Act of 1995, all concern ViON about our ongoing viability in the Federal marketplace.

ViON is a small business employing 31 individuals. We are a hardware integrator exclusively focusing on the U.S. Federal Government mainframe marketplace. ViON was formed in 1980; and over the last 15 years, we have performed successfully on major contracts with Social Security Administration, Department of Justice, Federal Bureau of Investigation, U.S. Customs, Air Force, Army, Navy, US Marine Corps, and the Internal Revenue Service (IRS), to list a few. Our most recent significant win was the IRS Corporate Systems Modernization/Mirror Image Acquisition (CSM/MIA) procurement valued at just under $100 million that provided the latest generation of mainframes and associated peripherals to the IRS.

ViON, as a small business vendor to the Federal Government, has long supported the need for sensible procurement procedures and reforms. However, for the reasons outlined below, I fear that H.R. 1670, if passed without modification, could do great harm.

Section 101 would amend existing regulations by replacing "full and open competition" with "maximum practicable competition." Here is a clear attempt to unravel the tenets of the Competition in Contracting Act of 1984. By repealing the standard of "full and open competition," government agencies would be encouraged to exclude those companies which have not already demonstrated their abilities, thereby preventing new participants from entering the market. If Government receives and evaluates too many bids from unqualified vendors, thereby wasting money, it is time to face up to some of the real causes of that problem: government contracting officers are not clearly enough defining their needs to prospective vendors and/or they are allowing less than fully qualified (i.e., fully responsive and responsible) vendors into competitions they have no place in, thereby wasting both vendor and government resources.

By rewriting 10 USC 2304 (c), (d), and (e), H.R. 1670 would eliminate the statutory standard for other than competitive procedures. The existing statutory criteria for non-competitive procedures were established to end unjustifiable sole-source procurements. Clear statutory guidelines provide a basis for rational decisions in contrast to generalized instruction which is particularly subject to abuse. Why re-animate the sole-source contracting of the 1970s, which prompted enactment of CICA originally?

The withdrawal of the previously committed requirements for informing small, small/disadvantaged vendors of revenue opportunities in the *Commerce Business Daily* (*CBD*) when FACNET is not available has not been helpful. Now I fear OFPP will launch test programs that only the very large vendors will be able to find and compete for the business that should be available within them. The notice requirements have been, and continue to be, a necessary source of information and protection for the small business community.

Recently, we reviewed 200 government online bulletin boards, located 50 that deal with procurements and that are of interest to ViON in our market segment. We have gone through the lengthy, time consuming and frustrating process of contacting the bulletin boards and/or in some cases the individuals responsible for the bulletin boards to gain access. (Some bulletin boards have security requirements.)

No two bulletin boards are the same; it is difficult to tell what information has been updated and during 8:00 a.m. to 5:00 p.m. time frame, it is difficult to gain access to many of these bulletin boards.

We now find agencies augmenting *CBD* notices with referrals to Internet. One agency has stated that for all purchases between $100,000 and $500,000 they will cease to publish in the *CBD* and will be done by using Internet only.

Today, we have to track *CBD* notices, multiple bulletin boards of different formats, and now Internet.

Companies, especially this country's smaller companies, need to know easily and quickly where business is in order to fashion responsive and responsible offers. This is a "feet on the street" issue–not a problem for companies with a lot of salesmen covering all possible business points, but a genuine disadvantage for others. The public policy impacts of this bill should neither be allowed to fall hardest on those who need accurate, timely procurement opportunity information most, nor on the resource rich firms.

Amending the OFPP Act to define a new standard of "maximum practicable competition" would invite protest after protest to define what the new standard means whereas "full and open competition" is in case law and is understood by bidders and agencies alike. The United States Board of Contract Appeals (USBCA) would be spending most of its time interpreting a new standard, and not preserving competition in the Federal marketplace.

The much expanded pre-qualification structure for Government offerors would tend to create a system of "verified" contractors. Pre-qualification based on the past has the effect of denying small business offerors the right to a subsequent opportunity to participate. Furthermore, whenever you make an arbitrary "cut-off" list without a re-review for responsibility and responsiveness, you never know if you have eliminated the potential winner. Congress established the Small Business Administration's Certificate of Competency (COC) Program because small businesses had not previously been given adequate opportunity to demonstrate their ability to perform contracts. And wherever competition is increased, cost savings increase also. The award of contracts for "commercial items" through "simplified procedures," regardless of dollar amount, when "simplified procedures" means, purely and simply, telephone

solicitation of only three firms of the contracting officer's choosing may be "competitive" in some simple cases, "scarcely competitive" in some, and all the way out to "a sole source" at the limit. Furthermore, "commercial items" are defined to allow not only items actually sold in the marketplace, but even un-built items that are "intended" to be offered in the future–a procedure that is appropriate in some cases, but not in others.

It is good to have the Government's reliance on the private sector for goods and services in proposed law! It is equally as important that inherently Governmental functions be restricted to Government employees.

The elimination of the specific certification requirements referred to, and the removal of current regulatory certifications, unless retention is supported by a written justification, are not bad things; nor is the prohibition against including new certification requirements in the Federal Acquisition Reform (FAR) unless mandated by statute or justified in writing. It will be refreshing having the Government working to keep regulations out of the FAR!

The consolidation of duplicative activities and a clear scope given to a single protest authority (modeled on the Government Services Board of Contract Appeals [GSBCA]) is laudable. A single protest authority is healthy, will be more cost effective than the current situation, and will provide a proper forum for vendor policing of an open market where full and open competition is the rule. It eliminates the constitutional problem associated with the GAO's status as an arm of Congress making dispositive remedies in executive branch protests and allows the GAO to focus upon its congressional support responsibilities. We would suggest that the discussion over

how the single (USBCA) entity deals with protests versus how it deals with contract adminitration issues requires further attention, but the matters each handles argue for a degree of separation between them. We do not know what that degree is–only that it makes good sense to build in from the beginning.

It is easier to be critical than constructive. We have critiqued H.R. 1670, but it was our attempt to be constructive, so we actually owe its framers a debt of gratitude for getting the process started. And, we hope that by standing on their shoulders, perhaps all of us can see a little further into the future. Permit us to observe there is work yet to be done. You need to complement their efforts by factoring in results of the actual day-to-day regulatory operation of FASA I, and that will require patience, time, and effort. Your common vision is on target with theirs: with constricted budgets and limited taxpayer dollars, it is crucial that the Federal procurement system be run fairly, efficiently, and most important, cost effectively.

Madam Chairman Meyers and Representative La Falce, thank you for the opportunity to present our views today; and, please remember as a small business we need knowledge of procurements, the ability to compete with the behemoth's of the market, and an effective form of redress for incorrect procurement practices. Thank you.

STATEMENT OF

JERE W. GLOVER
CHIEF COUNSEL FOR ADVOCACY
U.S. SMALL BUSINESS ADMINISTRATION

BEFORE THE

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON SMALL BUSINESS

JUNE 29, 1995

Good morning, Chairwoman Meyers and members of the committee. I am Jere Glover, the Chief Counsel for Advocacy in the U.S. Small Business Administration.

I am pleased to appear before the Committee on Small Business and I thank you for the opportunity to share the views of the Office of Advocacy[1] regarding provisions of H.R. 1670, the Federal Acquisition Management Reform Act of 1995.

Small business represents a critical and very important sector of our economy. Small firms employ almost 60 percent of the work force, contribute 54 percent of all sales, account for roughly 40 percent of gross domestic product, and are responsible for 50 percent of private sector output. More than 600,000 new firms have been created annually over the past decade, and over much of this period, small firms generated most of the Nation's new jobs. In addition, small firms produce twice as many significant innovations per employee (55% of total) as their larger counterparts.

In short, much of our nation's economic activity and growth can be traced to the small business community. However, small, small disadvantaged and women-owned firms receive a relatively small piece of the government procurement pie.

In fiscal year 1994, the federal government spent $196.4 billion for the acquisition of supplies and equipment, construction services, research and development and a variety of other services. Small firms, as reported by the Federal Procurement Data Center, received $39.7 billion or 20% of all government prime contracts. Of this amount, $28.4 billion were in contract actions over $25,000 and $11.2 billion were in contract actions under $25,000.

In contrast, seven large prime contractors, McDonnell Douglas, Lockheed, Martin Marietta, Northrop Grumman, Westinghouse, General Motors, and Raytheon together received $39.9 billion, or more federal contract dollars in the same year than all small businesses combined. Further, McDonnell Douglas alone received $9.8 billion in federal contract actions, or about $100 million more than was received in prime contract dollars by all minority firms for the same period. In addition, the federal receipts of McDonnell Douglas are almost double what was received by the aggregate of all 8(a) contractors and 3.2 times as much as was

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[1] The views expressed in this document are solely those of the Chief Counsel for Advocacy and may not necessarily reflect the views of the U.S. Small Business Administration or the Administration.

received in contract dollars by all women-owned businesses in FY '94.

While it may be true that there are no small firms manufacturing airplanes or missiles or automobiles, this data strongly suggests a need for small business initiatives that encourage and help small firms to compete for federal contract dollars. Further, we need to ask our selves, is it prudent to let a handful of large contractors dominate government business at the expense of squeezing many capable and diverse small firms out of the marketplace?

Competition is, and always has been, the basis of free enterprise and the foundation supporting our economy and the growth of small business. Historically, the government has found that competitive acquisitions accomplished through small firms are generally at lower costs. H.R. 1670 would, we believe, reduce the number of participating government contractors, by replacing full and open competition standards with standards based on "maximum practicable" competition.

The Office of Advocacy strongly supports procurement reform. The current procurement system is far too cumbersome. Further, we fully acknowledge that with the shrinking of both federal procurement dollars and the government work-force, there is a need to simplify and streamline acquisition procedures. However, it is imperative that our zeal to reform be sufficiently balanced with the needs of the small business community and the factors influencing long-term economic growth. It took many years to instill ample safeguards within the procurement process to encourage competition and increase opportunities for small, minority and women-owned businesses. Small firms and competition must not be sacrificed under the auspices of procurement reform. In achieving meaningful reform it is important that the procedures developed promote both competition and low cost procurements.

For instance:

bundling while reducing the number of procurement actions limits that procurement to firms of a certain size -- excluding new and smaller firms. The more bundling that takes place the less competitive procurements will become because this will result in fewer potential suppliers and higher costs.

limiting acquisitions to firms on a pre-qualified or "verified" list means that only established firms of a certain vintage are eligible -- new and/or growing firms may be excluded. The use of pre-qualification standards has the fatal flaw that only established firms can participate. How does a new or growing firm become "established" and how long will a list of pre-

> qualified firms be used? The more stagnant a list of pre-qualified bidders is, the less competitive procurements become.

It is, however, the new and/or growing small firms in the economy that are the most innovative and the most competitive portion of the government supplier base.

The U.S. economy is dynamic..., with firms being born and dying; with firms being competitive and less competitive; and, with growth and contraction. Government procurement is a part of the dynamic economy and will, in the long run, benefit from an open and freely competitive procurement system.

We are concerned that a change in language from "full and open" to "maximum practicable" competition, as proposed in H.R. 1670, would give agency contracting officers authority to limit significantly the number of possible vendor sources and erect barriers to new entrants. The proposed competition standard is achieved when a "practicable," or perhaps a convenient, number of capable firms are permitted to submit offers on a procurement.

As we understand it, the bill would establish a system made up of "verified" firms or businesses that have met certain past performance or pre-qualification standards with the government. The use of pre-qualification has the effect of denying to small business offerors the Congressionally mandated right to a second party review of the firm's qualifications to perform, a right that is established in SBA's Certificate of Competency (CoC) Program.

Congress established the CoC program because small businesses were not given adequate opportunity to demonstrate their ability to perform contracts. Data consistently reflect that firms which are awarded a contract due to receipt of a CoC perform as well as other firms.

In other words, a system employing "maximum practicable competition" standards would give license and incentive to contracting officers to use a "short list" of verified firms with whom they have had first-hand experience, without exploring the market-place for firms with comparable experience that may be more competitive.

"Maximum practicable" competition is not a new concept. Prior to 1984, federal agencies could apply "limited competition" standards, similar to what is being proposed in H.R. 1670, in awarding sole source contracts. Unfortunately, the absence of full and open competition resulted in higher government costs and widespread waste and abuse in many federal agencies. As a result, in 1984, the Congress passed the Competition in Contracting Act, which established the current standard of full

and open competition.

The 1984 law has saved the government billions of dollars and has fostered the development of many small and medium sized companies. It would be a mistake and a step backwards to embrace standards that do not foster full and open competition.

In addition, as currently drafted, H.R. 1670 would allow all commercial item acquisitions, regardless of dollar value, to be made pursuant to the simplified, commercial-type acquisition procedures which are currently authorized only for acquisitions below the simplified acquisition threshold.

While we support increasing efficiences in public procurement, purchasing all commercial items by use of simplified acquisition procedures could be particularly harmful to small businesses. The notice requirements are significantly modified for these purchases, and this change would mean that small businesses would not have ready access to information concerning a greater number of procurement opportunities

H.R. 1670 would remove the notice requirements from the Small Business Act, on the grounds they are also contained in the OFPP Act. The notice requirements, ensuring adequate notice of procurement opportunities and sufficient bidder response times, are a necessary protection for the small business community, and should remain in the Small Business Act. This may be duplicative in that it is contained in both Acts, but it is not duplicative in burden. It is merely a reinforcement of Congressional intent. If there is a necessity to eliminate duplication, the notice requirements should be removed from the OFPP Act.

Where the Office of Advocacy has concerns with certain provisions of H.R. 1670, especially those that would restrict competition, we applaud section 301 which would amend the OFPP Act to include a statement affirming that it is the policy of the government to rely on the private sector to supply its needs. Some additional small business provisions that might also be considered, as provided for in H.R. 1388, include:

- use of simplified acquisition procedures for service contracts, when the procurement is conducted as a small business set-aside; and,

- direct contracting with section 8(a) companies.

Chairwoman Meyers and members of the committee, I know I speak for the entire small business community when I say we are concerned about the speed in which procurement reform is being formulated. Less than nine months ago, the President signed the Federal Acquisition Streamlining Act of 1994 (FASA). This is a major piece of legislation that will significantly change how the

government does business. Many implementing rules have been proposed and, I believe, the final rules are to be published soon. The small business community, however, is very concerned about how the implementation of the law will affect them.

The Office of Advocacy has followed the implementing rules closely. We have testified at public meetings, met with the representatives from the Department of Defense, provided input to the agency teams drafting the implementing rules and filed numerous regulatory comments with the FAR Council on the FASA rules. From our perspective after reviewing the many proposed implementing rules, the small business community should be concerned.

It should be concerned because:

- Some of the FASA rules are not in full compliance with the Regulatory Flexibility Act. The Reg. Flex. Act requires implementing agencies to analyze the impact of their rules on small entities. Further, it requires agencies to consider alternatives that would achieve the purpose of the regulation, but without disproportionately affecting small businesses. Some of the key rules do not contain the required analysis, nor do they consider alternatives that would favor small business.

- The FASA law requires the establishment of a government-wide electronic commerce system for procurement opportunities. We applaud this necessary improvement. However, the implementing rule suggests that firms wanting to do business with the government will be required to absorb substantial costs just to gain access to the electronic commerce system. The proposed rule suggests necessary start-up costs of about $1,500 and monthly fees between $30.00 and $100.00, payable to a private Value Added Network (VAN) intermediary.

  Our review, after calling a number of the government certified VANs, suggests that the proposed costs are on the low side. -- Small firms do not have an accurate picture, will be disproportionately affected, and the high costs will preclude many small and emerging firms from participating in federal procurements.

- Some FASA rules encourage bundling, restrict notice and response times and give contracting officers latitude in limiting competition.

These are just some examples. Many of the procurement reform changes are happening quickly and without a full understanding of the impact on small business. Unfortunately, short-term efficiencies in process appear to be winning the battle over long-term tenets promoting competition, least purchase cost, and

small business development.

The small business community is NOT looking for preferential treatment or preference programs. Small firms want open access and a level playing field. Not only do they have a right to fair treatment, but it makes sound economic sense for small firms to play a significant role in federal procurements. Small firms have consistently demonstrated their capacity to foster competition, promote innovation, create jobs and provide long-term government savings.

Two weeks ago almost 2000 small business delegates from around the country participated in the White House Conference on Small Business. These dedicated entrepreneurs came to Washington, DC at their own expense to formulate and send a collective message to our nation's policy makers. These are hard-working people, unencumbered by the politics that too often cloud decisions made within the beltway. Several of the top recommendations advanced by this esteemed group of entrepreneurs focus on increasing access to federal procurement opportunities and open competition. The top sixty recommendations of the conference will soon be sent to the President in a report prepared by the White House Conference staff.

This is a unique time in history because there is a very strong, focused and bi-partisan interest in making real improvements to government. It is an opportunity to forge lasting and meaningful procurement reform. However, for reform to be meaningful and effective, it must be structured to favor long-term growth and efficiency, not short-term convenience.

Provisions in H.R. 1670 that appear to restrict competition would bring the government back thirty years, favoring the creation of an exclusive, yet limited network of vendors that would supply the government's needs, on their terms without the benefit of open competition. -- It would be a costly endeavor, as well as an exercise in regression, if the small business community were to be sacrificed at the expense of less competition, higher government purchase costs and fewer procurement opportunities for small firms.

Having said this, you need to know that members of my staff were invited to meet earlier this week with members of Chairman Clinger's committee staff to discuss H.R. 1670 and the concerns of the small business community. I have a meeting scheduled with Chairman Clinger tomorrow. I am encouraged by the receptivity and willingness of Chairman Clinger and his committee staff to consider alternative language and provisions in the bill.

Thank you for an opportunity to share the views of the Office of Advocacy.

BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON SMALL BUSINESS

Hearing on
The Federal Acquisition Reform Act of 1995
H.R. 1670
Thursday, June 29, 1995

Testimony of:
James E. Lewin, Jr.
Vice-President
Government Affairs
Sprint

Thank you Madame Chair for the opportunity to appear at this hearing and share Sprint's views on H.R. 1670, the "Federal Acquisition Reform Act of 1995," with this distinguished Committee. Sprint's comments are focused mainly on two aspects of the legislation: the repeal of the Competition in Contracting Act of 1984's (CICA) requirement of full and open competition in the Federal market, and the continuation of an effective competition enforcement mechanism at the proposed United States Board of Contract Appeals.

Although Sprint has annual revenues approaching $13 billion annually, our company is a relative newcomer to the Federal marketplace. Our first large Federal contract came in 1988 when GSA selected us as one of two contractors to perform the FTS2000 contract. This contract was awarded to provide state-of-the-art long distance voice, data, and video services to Federal agencies over a 10 year period.

At that time, Sprint had the nation's only all digital and all fiber optic network and was clearly a leader in applying the latest in telecommunications network technology. This is still true today. However, Sprint, as a company, was in existence only 2-1/2 years prior to the award of FTS2000. Sprint clearly was an

"outsider" facing large competitors who were already firmly entrenched in the Federal procurement arena. Without the full and open competition requirements of CICA, Sprint would probably still be an outsider today. Without full and open competition, we would not have had the opportunity to offer the Government our state of the art FTS2000 telecommunications services at prices that were less than one-quarter of the price of the old, pre-divestiture FTS system. We, therefore, have a special affinity for those small businesses who fear permanent "outsider" status or a return to the era of less than fully competitive procurements.

Under H.R. 1670, small businesses not only could lose out on opportunities to compete directly for Government contracts, but could lose subcontracting opportunities as well. The broadening of the Federal market to new players such as Sprint has a natural multiplier effect on the subcontractor opportunities available to small businesses. Sprint, unlike some of its more vertically integrated competitors, does not manufacture the products necessary to deliver its services to its customers, but rather purchases these from other subcontractors. Therefore, offering an opportunity to a new player like Sprint multiplies the opportunities available to a wide spectrum of small businesses that would otherwise be "outside" the process. For example, in 1993, Sprint maintained over 5,000 subcontracts (not including those under FTS2000) with small and disadvantaged businesses. In 1994, over 30% of all Sprint's subcontracted dollars under FTS2000 went to small and disadvantaged businesses. To date, Sprint has surpassed its FTS2000 small and disadvantaged business contracting goals by over 200%.

Clearly, while changes to the Federal acquisition system envisioned by H.R. 1670 could have an adverse impact on Sprint, the impact could be catastrophic to smaller vendors. While some improvements, designed to reduce redtape and unnecessary paperwork, are warranted, Sprint believes that movement away from the full and open competition requirements contained in current law would be a serious mistake. We are pleased that this Committee is taking the time to review the long-

term implications of H.R. 1670 and the impact it could have on the $200 billion a year Government procurement system.

Full and Open Competition

Sprint has a long-standing history of supporting procurement reform and the need for full and open competition in the Federal marketplace as required by the Brooks-Horton-Cohen sponsored Competition in Contracting Act of 1984 (CICA). We are deeply concerned by H.R. 1670's substantial move away from this competition standard and the elimination of CICA provisions that require procurement officials to justify using noncompetitive procedures.

We are not aware of any recent studies or surveys describing specific problems in the Federal procurement system that need legislation to correct them, much less how specifically this bill would address those problems. In fact, the most recent comprehensive reviewof the Federal procurement system was in 1993 when the Section 800 Panel concluded that abandonment of full and open competition is not justified.

Before Congress eliminates this crucial ballast, it needs to reflect on the state of the Federal marketplace before this competition standard was enacted into law by a Democrat controlled House and a Republican controlled Senate and White House. At the time of CICA's passage, approximately 60% of all Federal procurements were conducted on a noncompetitive basis and "sweetheart contracts" with favored incumbent vendors the norm rather than an aberration. Many of these noncompetitive contracts were plagued with waste, fraud, and abuse which led to high prices, enormous cost overruns and shoddy products.

When the Competition in Contracting Act of 1984 was passed, its opponentsargued that moving away from awarding sole-source contracts would dramatically increase the costs to the Government of procuring the goods and services it needed.

However, just the opposite occurred. CICA greatly increased the number of competitive procurements, saved the Government billions of dollars, and largely improved the quality of goods and services that the Government receives.

The increase in competition produced by CICA and the Brooks Act has given theGovernment enormous benefits, not the least of which is the ability to acquire telecommunications resources at prices below those charged to private firms for comparable products and services. For example, under FTS2000, GSA has reported that the taxpayers will save more than $4 billion over the life of the contract. The reasons for such cost-savings are: 1) the initial FTS2000 award was made on a truly competitive basis; and, 2) the two winning contractors have been placed in an environment where there is continual competition over the 10 year term of the contract.

Reducing Unnecessary Redtape and Paperwork

Sprint does agree with those who assert that it costs a great deal of money to do business with the Federal Government and steps can be taken to reduce those costs. Sprint supports the bill's provision eliminating the application of the Cost Accounting Standards and Truth in Negotiation Act to competitively procured commercial items. These laws were originally intended to be applied to non-commercial DoD weapons systems procurements. It is clearly in the best interests of both Government and industry to, as much as possible, avoid applying these types of unnecessary and burdensome requirements to the purchase of commercial items, the prices of which have been established in the commercial marketplace. While these types of improvements can and should be made to make it easier to do business with the government, these changes should not undercut the integrity of the process or reduce vendor confidence that they will be treated fairly.

Unfortunately, opponents of full and open competition continue to allege that CICA requires "competition for competition's sake.". That is a mischaracterization of the

Act. CICA is based upon the premise that all qualified contractors should have the opportunity to compete for Government contracts; even then, only those capable of meeting the Government's needs are be considered for contract award. Under CICA and the Federal Acquisition Regulation there exists ample authority to reject proposals of vendors who do not meet the Government's needs or are otherwise unqualified to bid. In addition, only qualified bidders in the competitive range are allowed to compete for awards. Reducing competition by further denying qualified bidders the opportunity to bid simply does not make sense.

Verification

As part of eliminating the CICA requirement for full and open competition, H.R. 1670 establishes a process of "verification" where Government agencies will decide who can and who cannot compete for Government contracts. This will create, in effect, a Government-controlled market to replace the current free-market driven system under CICA. Why should the Government replace its judgment for the judgment of a fully competitive marketplace? Does anyone really believe that reducing the number of qualified bidders on a procurement will result in better prices and lower overall costs? How can the Government be certain, that in choosing to exclude some qualified bidders, it is not inadvertently excluding the most cost effective and highest quality bid? Ultimately, by preventing qualified contractors from competing, the Government will spend more and receive lesser quality products and services.

Sprint is concerned that the bill does not provide any specifics as to how the verification process is to work or what purpose it serves. Instead, the Executive Branch is granted unbridled authority to establish the procedures by which the verification process is to be conducted and to determine which companies can compete. If the verification process is established on the basis of competence and record of performance, Sprint is confident that, in a fair and equitable administration of such process, it will qualify for participation in any program. But

why resort to this cumbersome, arbitrary, and potentially abusive procedure when the current system of full and open markets is working well?

Sprint believes that eliminating the full and open competition requirement may eventually result in only a few, large, well-connected companies receiving the lion's share of the Government's business. Companies that are awarded contracts year after year with little or no competition will not have the incentive to lower prices and keep up with the latest technology. The "verification" process contemplated by H.R. 1670 can be manipulated to set up barriers to those companies creating innovative products and services that are lower in price than products and services the Government's incumbent contractors are providing. Many of the companies eliminated in this process will be small, start-up companies that will not have the money or insider's knowledge to break through the type of "old boys" network that existed before CICA and could exist again under H.R. 1670.

Sprint is especially sensitive to this prospect. Through FTS2000 Sprint was able to provide the Government with high quality service and lower prices than under the old FTS. At the same time, Sprint was able to use that opportunity to continue its development of innovative services as evidenced through the many enhancement modifications to FTS2000. This opportunity allowed Sprint to become a major player, not only in the Federal marketplace but also to expand its presence in the commercial arena as well. If H.R. 1670's limitation on competition, and its fewer restrictions against uncompetitive practices had existed then, Sprint may not have been able to compete for FTS2000 and become the successful company that it is today. H.R. 1670 could eliminate such opportunities for other innovative companies as well.

Commercial Item Exception

Another potential problem exists in Section 202 of the bill which would provide for the use of "special simplified procedures" for the purchase of commercial items at

any dollar amount. The Federal Acquisition Streamlining Act (FASA) broadly defines commercial items to include services such as those provided under FTS2000 and even items that "are intended to be offered in the future.". As a result, a $10-billion government contract such as FTS2000, as well as just about any other contract, could be awarded with only a few phone calls. Procurements worth billions of dollars should not be conducted in the same manner as those worth several thousand dollars. The contentious and sometimes tedious negotiations involved in a procurement of the size and complexity of FTS2000 are necessary to ensure that the government will receive what it asks for, in the time frame that it needs the product or service. This is why the best and the brightest on both sides of the table are assigned the job of negotiating the details. These types of contracts simply do not lend themselves to the simplistic "two phone calls and a handshake" approach to contracting.

Procurement Integrity

Another provision with which Sprint has concerns involves the changes to the Procurement Integrity Act. These changes rescind current provisions of law designed to control waste, fraud, and abuse in the Federal procurement system. H.R. 1670 provides contracting officers with greater discretionary authority regarding the award of Government contracts but eliminates the Procurement Integrity Act provisions which require accountability on the part of the procurement officials by removing gratuity and post-employment provisions. Sprint questions the purpose of eliminating the current restrictions against contractors providing gratuities and job offers to Government officers with whom they are negotiating contracts.

Effective Enforcement of Competition -- Bid Protests

Sprint is pleased that the legislation recognizes the importance of the General Services Board of Contract Appeals (GSBCA) bid protest forum by maintaining the GSBCA's functions in the proposed unified Board. We believe that the GSBCA has

performed a unique and valuable role in helping to maintain a competitive Federal marketplace in ADP and telecommunications. The GSBCA's protest forum acts as an enforcement mechanism to ensure that Government agencies follow Federal procurement laws and regulations and treat potential contractors fairly and equitably.

The success of the Federal procurement system depends largely on whether the Government can attract enough qualified businesses that are willing to bid on Government contracts to maintain a highly competitive marketplace. Qualified contractors are only willing to go through the costly process of competing for Government business if they know that procurements will be competed fairly. Under CICA, ADP and telecommunications companies are provided that certainty through the bid protest authority of the GSBCA. If Federal agencies improperly deny a qualified company the opportunity to compete, a protest may be filed at GSBCA seeking fair resolution of the matter. This process has worked exceedingly well to eliminate favoritism and bias in the procurement process.

However, without a meaningful competition standard to enforce, the Board's authority would be hollow. A thriving, competitive Government procurement system needs two parts: a standard that requires full and open competition and an effective mechanism to ensure that the competitive procedures are followed. H.R. 1670 only provides us with part of the equation.

Conclusion

In closing, H.R. 1670 could have the very real impact of costing the Federal Government billions of dollars every year by fostering non-competitive procurements and driving small, newly successful and innovative companies out of the Federal marketplace. Sprint strongly urges Congress to thoroughly analyze the implications of H.R. 1670 before it rushes to enact this legislation. Sprint wants

competition to be the norm in the Federal market, not an aberration. H.R. 1670 as currently written will not achieve this result.

Sprint would be pleased to work with Congress to develop changes to H.R. 1670 that will improve the Government's procurement process without undermining the principles of full and open competition which have served Government and taxpayers so well.

Thank you very much.

Statement of Associated Builders and Contractors

TESTIMONY OF GERRY NOWAK
PRESIDENT
MERIDIAN CONSTRUCTION COMPANY

BEFORE THE
HOUSE SMALL BUSINESS COMMITTEE

EFFORTS TO OVERHAUL
FEDERAL PROCUREMENT AND ACQUISITION LAWS

JUNE 29, 1995

Speaking for the Merit Shop

1300 North Seventeenth Street
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(703) 812-2000

Good morning. My name is Gerry Nowak, and I am President of Meridian Construction of Gaithersburg, Maryland. I am pleased to be here to today to testify on behalf of Associated Builders and Contractors (ABC).

ABC is a national trade association representing approximately 17,500 contractors, subcontractors, material suppliers, and related firms from across the country and from all specialties in the construction industry. Our diverse membership is bound by a shared commitment to the merit shop philosophy of awarding construction contracts to the lowest responsible bidder, regardless of labor affiliation, through open and competitive bidding. This practice assures taxpayers and consumers the most value for their construction dollar. With 75 percent of construction performed today by open shop contractors, ABC is proud to be their voice.

ABC appreciates the opportunity to appear before the committee to represent the nation's construction industry and comment on recent efforts to overhaul federal procurement and acquisition laws. While ABC members are interested in many of the ongoing efforts to reform the federal procurement system, I will focus my comments on Title I of H.R. 1670, the Federal Acquisition Reform Act of 1995.

While ABC commends Congress for its efforts to streamline the costly and inefficient practices of the federal procurement system, provisions in Title I of H.R. 1670 would have unintended and significant adverse consequences on the nation's construction industry. Title I would institute fundamental changes in the established federal procurement competition standard, as contained in 10 USC 2304 (a), by lessening the current system of "full and open competition" and replacing it with a "maximum practicable" standard. It would also remove the preference for sealed bid procedures. ABC has very strong concerns with the impact of these changes on the construction industry.

It is a basic tenant of the free market system that all sources be given the opportunity to compete for work. This includes full and open consideration for government construction contracts for all bidders -- large and small, old and new entrants into the federal market, etc. The current procurement system has adequately provided the construction contracting community with equal access to participate in federal procurement programs, as well as restricted the opportunity for partiality and abuse within the system.

Under H.R. 1670, the federal procurement officer would be authorized to obtain competition to the extent "maximum practicable." This would reverse the statutory standard of "full and open competition" imposed by the 1984 Competition in Contracting Act (CICA), which was enacted to eliminate the earlier practice of "maximum practicable" and the soul-source contracting it fostered. Essentially, agencies will be allowed to narrow the field of competition and determine the competitive range, presumably on a case-by-case basis for each contract.

Although the bill's stated aim is to insert a "commercial like process" into the federal procurement system, there is a fundamental difference between the government and the private sector. The federal government uses taxpayer dollars for procuring goods and services. With this, comes an obligation to provide the taxpaying public with a fair and equal opportunity to compete. Any American business which has the capability to perform the contract should have equal access to the federal market. No business, no matter how small or large, should be excluded from competition at the pre-bid stage. Full and open competition ensures fairness in a competitive process which has significant potential for subjectivity and abuse.

Congress should not allow the bureaucratic process to narrow and select the field of competitors. Instead, the market, which provides its own effective screening process, should be allowed to determine which companies are able to compete. The competitive range can be adequately defined by the contract specifications and market forces which will appropriately screen out unqualified contractors. Specifically, contractors must obtain a "bid bond" for all federal contracts, which assures the government that the contractor has passed a surety's rigorous pre-qualification process and is capable of successfully performing the contract.

H.R. 1670 would essentially repeal the statutory protections in place for construction contractors and instead impose a new "verification" system which provides no guidelines and leaves implementation totally to the discretion of the regulators. ABC has significant concerns with the potential for a blanket verification system that applies across the board to all contractors. Such a procedure may be justified for highly technical products, but is inappropriate for the construction

community where the contract specifications provide the qualifications necessary to perform each contract. In the proposed verification system, contractors would be "verified" based on an assessment of the firm's business practices -- as determined by the regulation writers -- with regard to relative efficiency and effectiveness of business practices, quality level, and demonstrated contract performance. The new process provides no standards as to how companies will be allowed to compete for a place on the "verified" list and whether it will be standardized across all agencies. Unfettered discretion in deciding the appropriate category of contractors fosters significant potential for abuse. Procurement officers with hidden agendas ultimately could create an exclusive and limited network of vendors to service the government.

Providing the procurement officer with the ability to exclude companies from competition in the pre-bid process will particularly discriminate against small companies and businesses seeking entrance into the federal market. Allowing less than full and open competition would permit and encourage the procurement officer to exclude companies which have not already demonstrated their ability in federal contracting. It would create a preference for those who have penetrated the market to the disadvantage of new entrants. Thus, restricting competition prior to the bid process results in a bias toward larger, more experienced contractors who are better positioned and more likely to make it on the "short list" and unfairly discriminates against small and new businesses. For the construction community, this will certainly limit development of the industry. New companies are unlikely to be considered for contracts. The current standard of full and open competition has been a proven method of ensuring equal access for all qualified companies and has made it possible for new construction contractors to gain entry and build a résumé of federal work.

An important goal in reforming the federal government has been to remove the barriers placed on small and emerging businesses and create opportunities which will help them compete and succeed in the marketplace. Procurement reform should not only facilitate the process for federal purchasing agents or the few large companies who receive the majority of contracts, but should also help lessen burdens, remove obstacles, and ease participation for small businesses. An open market system encourages new entrants, anything less becomes prohibitive.

H.R. 1670 assumes limiting competition will result in cost savings for the government. However, ABC is unaware of any studies which have demonstrated that "too much competition" is expensive. In fact, vigorous competition lowers prices and helps ensure the taxpayer receives quality products at reasonable costs. Substantial budget and taxpayer savings occur through open market forces which allow maximum competition. The government should take advantage of increasingly competitive markets, not try to limit the process in hopes of making the bureaucracy more efficient.

The legislation would also remove the current preference for sealed bid procedures. ABC believes competitive sealed bidding should continue to be the preferred method of awarding construction contracts. ABC supports the sealed bid method of government contracting over negotiated procurement and other methods, as it is simpler to administer, creates more competition, is less subject to fraud and abuse, and generally ensures a higher quality product. ABC strongly

believes that the sealed bid process is a proven method of procurement which serves the government, taxpayers, and the construction industry well.

In conclusion, it is the government's responsibility to its taxpayers to obtain the lowest possible price in procuring goods and services. This can be achieved in awarding construction contracts under current procurement law which allows unrestricted competition and provides statutory safeguards designed to ensure a field of qualified and responsible contractors. The established invitation-for-bid process is an effective and objective procedure which provides equal access for responsible construction contractors who are guaranteed through surety requirements for bid, performance, and payment bonds.

ABC very much appreciates the Small Business Committee's consideration of the impact of H.R. 1670 on the nation's builders and contractors, and small businesses in particular. We urge the Committee to oppose any change in the "full and open" competition standard for the construction contracting community and to support continuation of the preference for use of the competitive sealed-bid process. On behalf of Associated Builders and Contractors, I again want to thank Congresswoman Meyers and the members of the Committee for the opportunity to testify here today. I will be happy to answer any questions you may have.

Your Voice on the Hill

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TESTIMONY BEFORE THE U. S. HOUSE OF REPRESENTATIVES COMMITTEE ON SMALL BUSINESS REGARDING THE FEDERAL ACQUISITION REFORM ACT OF 1995 H.R. 1670

Presented by Aleta Robinson Wilson,
Past Chairperson

June 27, 1995

I am honored to have the opportunity to speak before the Committee on the proposed bill. In addition to my affiliation with NAMB, I am a small, minority and woman business owner. Therefore, the proposed bill will have a major impact on my ability to sell products or services to the federal government.

As I learn more about the legislative processes, I become both concerned and pleased at how the system works. On the one hand, the system allows me to come before you and voice the opinion of the small and minority business community. On the other hand, that same system can write legislation like H.R. 1670 with no concern for the small businesses that are the backbone of this country.

I am all for the free enterprise system and competition. I firmly believe that the current procurement system needs major overhaul and I applaud the Congress for the steps that they have made in the Federal Acquisition Streamlining Act of 1994 (FASA). I suggest to you that FASA made such sweeping changes to the procurement system that we do not yet know of the full effects of those changes. Additionally, we cannot know of the effects until all of the regulations have been written and implemented.

As you know, the majority of the small business community employs less than 5 people. That means that small business owners are busy conducting their businesses during 60 hour work weeks. That leaves very little time to pay attention to these types of legislative actions. The vast majority of the small, women and minority owned businesses are totally unaware of the contents of this bill, but that is why they send you here. You are here to protect the interests of the small business owner. Therefore, it is your duty to see to it that this bill not go into law for the following reasons.

Section 102

The basis of H.R. 1670 is to eliminate full and open competition. The minority, women-owned and small business community are all tax payers. In fact, we probably pay proportionately more of our revenues into the tax till than the large businesses that will benefit from this bill. Our tax dollars contribute to the $200 billion that the government spends and therefore, we must be allowed to fully participate in the procurement system. Maximum practicable competition will dramatically reduce our ability to sell to our own government.

Section.35.Contractor Performance

I understand that the current procurement process is sometimes expensive, lengthy and inefficient, but that is not sufficient reason to bar the small, minority and woman-owned business community from the process, and that is what this bill does. It does that by restricting procurements to "verified sources". If verification means that a company must show satisfactory past performance, then that effectively closes the door to small and emerging businesses that do not have a track record. If verification means that a small and emerging business must show efficiency and effectiveness of their business practices, then that also closes the door to federal procurements because they do not have the track record.

Under this type of action, all large contractor companies are guaranteed to be on the "verified" list and many small, minority and women-owned businesses will not be able to get on the "verified" list. If you believe that small business is the backbone of the economic development of this country, then you cannot allow this legislation to pass.

Sec.104.PRE-AWARD DEBRIEFINGS

Debriefings are essential to the small, minority and woman-owned firm because that is where the lessons are learned. I was pleased to see that the "excluded offeror may request in writing,

within three days after the date on which the excluded offeror receives notice. Unfortunately, three days is insufficient for the most efficient organization. For instance, notice received on Friday could equate to giving the excluded offeror one day to request a debriefing. If this remains in the bill, then it needs to be changed to five business days.

The other part of this section that is troubling is that the government can refuse the request for a debriefing. It is common knowledge that once a contract is awarded, it is seldom stopped. Overturning an award takes a lot of time and money, which means that a small, minority or woman-owned business may not have an opportunity to receive a contract that they may have been legitimately entitled to receive.

Section 202

I am almost speechless that the government would leave the purchase of commercial items, regardless of dollar value, in the hands of the contracting officer. As a small business owner, I am locked out unless I know each and every contracting officer in the federal government. As a taxpayer, I am outraged that the federal government would provide that kind of latitude to contracting officers. We have already learned from the past, that this type of authority leads to broad abuses and the buddy-system.

In closing, I again state that I am pleased to be a part of a system that allows me to voice my opinion. I implore you to protect the interests of the small, minority and woman-owned business community by voting against H.R. 1670.

Respectfully submitted,

Aleta Robinson Wilson
Past Chairperson

Statement

By

The Associated General Contractors of America

Presented to the

Committee on Small Business
U.S. House of Representatives

on the topic of

H.R. 1670, Federal Acquisition Reform Act of 1995

June 29, 1995

The Associated General Contractors of America (AGC) is a national trade association of more than 33,000 firms, including 8,000 of America's leading general contracting firms. They are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects and site preparation/utilities installation for housing development.

The Associated General Contractors of America
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EXECUTIVE SUMMARY

The Associated General Contractors of America (AGC) submits this statement to the Committee on Small Business to present our views on HR 1670, the Federal Acquisition Reform Act of 1995. AGC supports the stated policy for increased reliance by the government on the private sector to supply necessary goods and services. A stated policy of increased reliance on the private sector for the procurement of construction services will serve the taxpayers and the construction industry and the government well.

AGC supports a continued strong, effective bid protest system and believes it is essential for construction contractors to have a fair, equitable, efficient procedure for resolving disputes.

AGC opposes the proposed change to the competition standard from the current "full and open competition" to a new standard of "maximum practicable competition" because:

- this can limit access to federal contracts
- will increase costs
- will result in considerable litigation
- will result in greater use of negotiated procurement in lieu of sealed bid

The Associated General Contractors of America (AGC) appreciates the opportunity to present our views to the House Committee on Small Business on the impact of HR 1670, the Federal Acquisition Reform Act of 1995, on small businesses. The vast majority of AGC's member firms are small business construction firms as defined by the Small Business Administration and many are engaged in the federal contracting arena. As such, AGC is very interested and quite concerned over some of the provisions of HR 1670 and applauds Chairman Jan Meyers for holding hearings to receive testimony from the small business community to better understand the implications of HR 1670.

As introduced on May 18 by House Government Reform and Oversight Committee Chairman, William F. Clinger, Jr., HR 1670 provides for new competition requirements for federal contracts. Title I replaces the current standard for "full and open" competition as required by the Competition in Contracting Act (CICA) since 1984 with a new standard of "maximum practicable" competition. This change in AGC's view would allow contracting officers to limit the competitive range for federal contracts and in turn restrict access for contractors interested in bidding on federal work. Such a procedure for construction procurement would result in great waste of tax dollars. AGC believes that full and open competition provides maximum opportunities for all firms to compete for federal contracts. It is one thing to submit a bid and not be awarded the contract because the bid was not the lowest, most responsible, responsive bid. It is quite another thing to be prevented from submitting a bid in the first place because contracting officers may have a preference for others.

The primary reason CICA provided for full and open competition was so that the Government could obtain quality goods and services in an efficient, effective and economical manner. This standard of full and open competition, now in place for over a decade, works well, is understood by contracting officers and contractors, and is supported by years of case law. To change the standard now to "maximum practicable" in our view is a step backward, back to the days of limited competition among a favored few, or worse, a sole source. Furthermore, as with most new statutory definitions, this new standard will likely be the subject of considerable litigation.

Moreover, not only does HR 1670 change the competition standard, but it also removes CICA's requirements for justifications before using other than competitive procedures. Without these minimal justifications, there is nothing to prevent contracting officers from completely abandoning the competitive sealed bid process in favor of negotiated procurement. AGC has found over the past five years that some agencies have increasingly relied on negotiated procurement for construction contracts complaining that sealed bidding was too complicated and time consuming. Some contracting officers may have a preference to negotiate with a few selected contractors instead of evaluating bids from all responsible, responsive bidders. Except under unique circumstances defined by current law or regulation, a subjective process is no substitute for the award of construction contracts to the lowest, responsible, responsive bidder.

For construction procurement, the sealed bid method has proven to be an administratively simplified way to select construction contractors and limits the opportunity for fraud while providing competitive services to the government at the lowest reasonable cost. Formal

advertising, or sealed bidding, has withstood the test of time as the tried and proven way.

Sealed bids, or "invitations for bids" (IFBs), require well defined plans and specifications that allow construction contractors to respond accurately in terms of the money, manpower, time and skill necessary to construct the project. IFBs are relatively easy to plan. The architect/engineer (A/E) designs the project and develops plans and specifications, which are reviewed for errors and omissions and for constructability. The government then issues IFBs to contractors containing all the relevant requirements for constructing the project. The contracting officer does not need to devise a plan for source selection with its independent requisite standards and factors necessary to evaluate proposals as in the case of negotiated procurement.

IFBs are also easier for the government to administer. When the bids are received from the contractors, the contracting officer only has to ensure "responsiveness" (that is, does the bid meet the requirements of the plans and specifications) and "responsibility" (can the contractor complete the contract in terms of finances, manpower availability and experience) of the contractor who submitted the lowest bid, for purposes of awarding the contract.

Normally, a major advantage of IFBs for construction contracts is that they take less time to award. There is usually no requirement for a costly source selection board or highly-knowledgeable technical evaluation team that must painstakingly evaluate each proposal and all its nuances. And, except under unusual circumstances, IFBs are less costly to administer and they most often solicit the lowest price to construct the project.

AGC supports the preference for submitting bids in response to IFBs. The sealed bid is a system known and accepted by both the government and the construction industry. Contracting officers are experienced in administering IFBs and the procedures involved in awarding contracts under the system. Contracting officers do not need additional training or further education concerning federal procurement in order to administer IFBs. Because of the objective nature of awarding contracts using IFBs, contractors are less likely to invoke time consuming protests than if negotiated procedures were used.

In summary, AGC maintains that public construction procurement must assure the taxpaying public that the project is produced in the most economic and efficient manner possible. The public owner's interests are best served by soliciting and selecting contractors on a fully open and competitive bid basis where the award is made to the lowest responsive and responsible bidder after public advertisement. AGC is concerned about the increased reliance on negotiated procurement with preferred contractors where justified exceptions do not exist. AGC recommends maintaining the preference in federal construction for open competitive bidding, with clearly delineated exceptional circumstances where negotiated construction procurement may be appropriate.

Regarding Title III of HR 1670 and Section 301, AGC wholeheartedly supports the stated policy for increased reliance by the government on the private sector to supply necessary goods and services. In the case of construction, public works projects performed by a governmental unit using public employees with equipment purchased or leased by the government cannot ever

result in the most efficient, cost-effective and economical manner of procuring construction services. A stated policy of increased reliance on the private sector for the procurement of construction services will serve the taxpayers and the construction industry and the government well. AGC favors such reliance not only because it is in the interest of general contractors, subcontractors and material suppliers to have greater opportunities for federal contracts, but also because every citizen shares in the benefit of the competitive bid system; the public obtains the services of competent contractors; the quality of the work is bonded; and the final cost of the work is known and guaranteed.

Finally, AGC supports a continued strong, effective bid protest system and believes it is essential for construction contractors to have a fair, equitable, efficient procedure for resolving disputes. HR 1670 establishes a new, unified executive branch agency to review all bid protests and disputes related to contract claims -- the U.S. Board of Contract Appeals. AGC supports additional tools such as "Partnering" and administrative dispute resolution to help prevent litigation and lower costs and increase productivity. The bid protest system established by CICA provided a necessary enforcement mechanism to ensure that procurement procedures were not abused and AGC would not want to see that bid protest system diminished.

Again, AGC applauds the oversight authority that this committee provides so that the small business community's concerns can be considered when legislation advances which will have a significant impact upon this sector of our economy.

Critical Legal Issues:
WORKING PAPER SERIES

GOVERNMENT CONTRACTS REFORM: A CRITICAL ANALYSIS OF THE ADMINISTRATION'S PROPOSAL

by

Jed L. Babbin and Thomas Earl Patton
Tighe, Patton, Tabackman & Babbin

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TABLE OF CONTENTS

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As senior advisor to the Under Secretary, Mr. Babbin provided advice and counsel in the framing of acquisition policy and management of the external affairs of the USD(A) organization. He managed programs to promote understanding of complex acquisition issues and major initiatives and reforms.

Mr. Babbin is an engineer and an attorney. He received his Bachelor of Engineering degree from Stevens Institute of Technology, Hoboken, New Jersey, in 1970. He received a Bachelor of Laws from Cumberland School of Law, Birmingham, Alabama, in 1973, and a Masters of Laws from Georgetown University School of Law in 1978.

From 1985 until being appointed to the Defense Department in 1990, Mr. Babbin was Director of Contract Policy, Lockheed Corporation. He was the Washington-based advocate of the corporation's positions on all regulatory and legislative matters of acquisition and tax policy. He was responsible for developing and coordinating industry and company efforts to influence government policy. He served as a member of the 1988 Defense Science Board Study of the Defense Industrial and Technology Base, and provided support of the Defense Advisory Panel on Government-Industry Relations.

From 1981-1985, Mr. Babbin was Vice President and General Counsel, Shipbuilders Council of America. He performed duties as the Council's principal counsel, media spokesperson, and congressional liaison on policy issues including national defense, maritime matters, and federal acquisition.

Mr. Babbin was associated with the Washington, D.C. law firm of McKenna & Cuneo from 1977 to 1981 as trial counsel for corporations in litigation arising under government and private contracts. After graduation from law school, Mr. Babbin served on active duty with the U.S. Air Force as a Judge Advocate, assigned to Sacramento, California Air Logistics Center and the Civil Litigation Division at U.S. Air Force Headquarters.

Thomas Earl Patton is also a partner with Tighe, Patton, Tabackman & Babbin. Mr. Patton has over 25 years' experience in handling complex business and financial disputes in trials, appeals, arbitrations, and SEC enforcement proceedings. He has tried over 100 cases and has been involved in the resolution of hundreds of other disputes and proceedings.

Mr. Patton began his practice on Wall Street at Sullivan & Cromwell after graduating *summa cum laude* and serving as law review editor-in-chief at Catholic University. He then served as counsel to a Senate committee before joining Williams and Connolly. During 1977-78 he served as Assistant General Counsel for litigation at the U.S. Department of Energy and was responsible for civil and criminal energy law enforcement. From 1979 to 1994, Mr. Patton managed the Washington office of a national law firm, Schnader, Harrison, Segal & Lewis, and concentrated in securities enforcement cases, government contract fraud cases, and antitrust. Since 1989, he has served as a director of a publicly traded telecommunications corporation, and is currently also a director of a financial services marketing data company.

Mr. Patton is a member of the D.C., Virginia and New York bars, seven federal circuit courts, six federal district courts, and of the bar of the U.S. Supreme Court. He has published a treatise entitled *Securities Fraud*. For twelve years, he was distinguished lecturer on procedural and substantive aspects of complex federal litigation. Mr. Patton was the founder and first chairman of the D.C. Bar Section of Litigation and is the 1994 chair of the Bar Association's Litigation Committee.

The authors would like to thank **Robert Vitter** of Grant Thornton for his invaluable assistance in analyzing the data from which we drew our conclusions. We greatly appreciate the assistance of **Robert Dornan** of Federal Sources, Inc., for his considerable assistance in allowing us access to his encyclopedic database.

The views expressed here are those of the authors and do not necessarily reflect those of the Washington Legal Foundation. They should not be construed as an attempt to aid or hinder the passage of legislation.

EXECUTIVE SUMMARY

- This WORKING PAPER argues that the current Administration's bid protest reform proposal is flawed in its reliance on faulty statistical analysis and its failure to recognize the importance of bid protests in the government procurement process. The recommendations proposed by the Administration are not substantiated by the data relied upon, and do not accurately represent the current information technology procurement environment.

- The February 1995 proposal, which was developed as part of the National Performance Review, recommends changing the standard of review applicable to agency's procurement decisions from *de novo* review to a rational basis standard; including the cost of an unsuccessful protest as an unallowable cost; encouraging agencies to establish internal procedures for such protests, and obtaining certification from bidders against using any other forum; divesting U.S. District Courts of jurisdiction; allowing agencies to override the automatic suspension of procurements protested within ten days of award; and allowing the General Accounting Office (GAO) and the General Services Board of Contract Appeals (GSBCA) to assess penalties for frivolous protests.

- Flaws in the data underlying the Administration's recommendations include overstatement of the number of contract awards actually protested and exaggeration of the amount of time that protested contracts are delayed.

- The extreme complexity of the federal procurement system requires a balance to the power of procurement officials in determining contract awards. The bid protest mechanism protects competing firms against institutional bias, incorrect price and technical evaluations, and poorly written requests for proposals.

- In promulgating these recommendations, the Administration overlooks the necessity of the GSBCA process. This process allows judges dealing with complex information technology protest to be experienced in technical issues, provides a suspension mechanism to compel an agency to stop performance of the contract during the protest period, and permits *de novo* review of agency decisions.

- Finally, this WORKING PAPER suggests some workable solutions to bid protest problems, including the imposition of liability for frivolous protests, disallowing protest costs for protests that are not granted in their overhead pools, and require alternative dispute resolution before proceeding with protests to the GSBCA or GAO.

GOVERNMENT CONTRACTS REFORM: A CRITICAL ANALYSIS OF THE ADMINISTRATION'S PROPOSAL

by

Jed L. Babbin and Thomas Earl Patton
Tighe, Patton, Tabackman & Babbin

INTRODUCTION

Bid protests help shape the course of many large information technology (IT) procurements. During the bidding process, companies can risk millions of dollars competing for these contracts. A mechanism to deal with unfair and illegal government procurement decisions is necessary to protect fair competition among contractors. Currently, firms which believe they are injured from incorrect awards may file challenges in federal district court, the Court of Federal Claims, the General Services Board of Contract Appeals (GSBCA), or the General Accounting Office (GAO).

The Clinton Administration is proposing to revolutionize the protest system by limiting both the forums and means available for challenging improper contract awards. The Administration has based its proposals on outdated information and one-sided government analysis.[1] These initiatives cannot be substantiated from the facts since the key data underlying their attack on bid protest remedies do not accurately represent the current IT award/protest environment. The recent GAO report on IT contract awards[2] — containing the data which underlie the Administration's recent policies — has exaggerated the

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[1]TO IMPROVE THE FEDERAL INFORMATION TECHNOLOGY ACQUISITION PROCESS, report number KAP-94-5-P, June 1994.

[2]INFORMATION TECHNOLOGY: A STATISTICAL STUDY OF ACQUISITION TIME, B-258954, Mar. 13, 1995.

amount and effect of bid protests in recent years. The Office of Federal Procurement Policy (OFPP) has used this data to criticize bid protests as a barrier to innovation, a substantial source of litigation, and a cause of agency inefficiency.

This WORKING PAPER will delineate the procedural and statistical flaws in the Administration's proposals and establish that, while the current bid protest process is not without fault, the proposed changes would only undermine the fairness of existing procedures.

The data analyzed in this paper reveal that only 17% of IT procurements valued at over $10 million were protested in FY 1993 and 1994. This figure was found to be relatively constant across the range of award sizes. Furthermore, out of the thirty-five protests against large awards filed in 1993-94, only two were granted, and most were withdrawn within a month. Finally, the average delay per protested contract was 45 days, and the average for all awarded contracts due to protests (as opposed to the government reactions to the threat of a protest) was only eight days. These figures refute both GAO's findings and the subsequent implication that the current protest process is a major impediment to efficient procurement.

This paper will also question the Administration's major revisions in terms of their ability to ensure more efficient procurement procedures and resolution of protests. These changes, as discussed below, would have the effect of discouraging would-be protesters from asserting their rights without a positive net effect on the procurement process.

Finally, the comparative advantages of bid protest resolution by the Government Services Board of Contract Appeals (GSBCA), GAO, and federal courts is discussed as well as potential improvements which would advance the interests of both procuring agencies and contractors. These improvements

include reassessing the jurisdiction of protest-resolving bodies, increased authority being granted to GSBCA in granting remedies, and applying procurement laws to those agencies not currently subject to them.

I. THE ADMINISTRATION'S PROPOSED REFORMS

A. Procurement Reform: A Frequent Refrain

Every administration since the mid-1950s has tried to remake the federal procurement system in its own image. In the late 1980's, Congress joined in to change virtually every aspect of the system. These changes came rapidly, ranging from which costs could be charged to the government, all the way to "work measurement," which would have imposed old-fashioned time and motion studies on production workers in the aerospace industry.

The usual vehicle for change has been the Presidential study panel. Over the years there has been the Hoover Commission, the Packard Commission, the Grace Commission, and the Congressionally-created "Section 800" Panel which recently completed its work. Each of these groups was comprised of experts from industry and government, many of whom were preeminent in their fields.

Now the current Administration, through the Office of Management & Budget's Office of Federal Procurement Policy, has taken a road less travelled in its attempt at procurement reform. The Administration chose to ask only government officials for recommended changes. The resulting recommendations reflect a one-sided solution to a problem that may not exist. This cure may be far worse than the disease in their proposal to change the bid protest system.

B. The National Performance Review Proposal

The Administration's proposal is part of the National Performance Review (NPR). An NPR working group's report on the IT procurement process asserted that

> because they fear a protest, agencies often go to extraordinary lengths to keep offerors in the competitive range . . . agencies will go to great lengths to avoid making arguable decisions that may be protested and often issue solicitations that lack creativity, fail to seek leading edge technology, and produce less than optimum solutions. Thus, unwise technical compromises and business decisions are made because they fear a protracted procurement . . . vendors sometimes use the protest process as a strategic tool for delaying a procurement in an effort to gain competitive advantage.[3]

The government's arguments would be more persuasive if the Acquisition Improvement Team or OFPP had chosen to back up their assertions with an analysis of the IT protest process. No facts, however, were presented to support the assertion that bid protests "stymie innovation and creativity" or cause agencies to prepare "solicitations that . . . fail to seek leading edge technology."

The February 1995 proposal very closely follows the June 1994 panel report. The report recommended doing away with all protest remedies except the GAO protest. The Administration's package stops just short of this. It would make six major changes to the protest system:

1. The GSBCA's *de novo* review of agency action would be changed to GAO's standard, which only requires that an agency's decision have a rational basis;

2. Another category of unallowable costs would be added to the

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[3]*Supra* note 1, at 4-1, 4-2.

already long list. Along with lobbying costs, entertainment and other otherwise legitimate business expenses, the cost of an unsuccessful protest would be disallowed;

3. Agencies would be encouraged to establish internal procedures for considering protests against their own actions. If they do so, agencies could demand certifications from bidders in their proposals that no other protest forum would be used;

4. The U.S. District Courts would be completely divested of jurisdiction, with the Court of Federal Claims left as the only federal court with jurisdiction over these cases;

5. The automatic suspension of procurements protested within ten days of award, both under the Brooks Act and under the Competition in Contracting Act, could be overridden at agency discretion, just as they are now in GAO protests; and

6. Both GAO and GSBCA would be authorized to assess penalties for frivolous protests, and forbid protests (other than internal agency protests) in awards made in the new Federal Acquisition Computer Network ("FACNET") system.

II. STATISTICS DO NOT SUPPORT THE ADMINISTRATION'S DESIRE FOR REVOLUTIONARY REFORM

This paper's analysis of the impact of protests on the IT procurement process is based on a critical analysis of the GAO Report's statistics. Three primary sources of data were examined and analyzed for this WORKING PAPER. First, GSBCA Chief Judge Stephen M. Daniels and Deputy Chief Judge Robert Parker were interviewed, and the GSBCA protest docket for FY 1987-1994 was reviewed. Next, a database of all GSBCA and GAO IT protests decisions and a separate database of recent large IT contract awards provided by Federal Sources, Inc. were used as the basis for the development of a database for IT procurements awarded in FY 1990 through 1994. Finally, all GSBCA decisions

of protests filed in FY 1993 and 1994 using the TAuRUS (Technology Acquisition Resource Update Service) CD-ROM database were reviewed in order to complete and verify the accuracy of the data we used.

The data underlying the Administration's attack on the bid protest process was drawn from the recent GAO report.[4] The GAO reached two conclusions that form the basis of the Administration's reform plan. The first is that 44% of IT contracts valued at more than $25 million are protested. The second is that protested contracts take, on average, 222 days longer than those which are not protested. This paper's analysis refutes both of these statistics. The GAO statistics, which are based on data from FY 1990-1992, exaggerate the more recent years' figures and the effect of protests by more than 100%. Any proposals based on these statistics are questionable.

A. GAO Statistics Misrepresent GSBCA Treatment of Bid Protests

Despite the complaints that are offered, protesters prefer — and the agencies find little fault with — the GSBCA's treatment of bid protests. The Section 800 panel examined the protest process closely and recommended that, "The GSBCA-type procedure would be available for all types of procurements over $100,000, if elected by the protester."[5] Since 1987, an average of 248 protests have been filed each year at the Board,[6] and 247 were disposed of by decision or settlement. Few protests are granted, and the government appeals almost none of the decisions. In FY 1994, 179 protests were filed with the Board. Over 81% were withdrawn or settled, most in two weeks or less.

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[4]*See* INFORMATION TECHNOLOGY: A STATISTICAL STUDY OF ACQUISITION TIME, B-258954, Mar. 13, 1995.

[5]Report of the Acquisition Law Advisory Panel, Jan. 12, 1993.

[6]Source: GSBCA docket records.

The recent GAO Report stated that 44% of contracts over $25 million were protested based on a survey of contracts awarded in 1990 and 1991. We identified 123 contracts awarded in 1993 and 1994 valued at over $25 million. Of those, 26 (20%) were protested. This is less than half of the 44% claimed in the GAO study and relied on by OFPP. One possible explanation of the difference between our numbers and those of GAO is the substantial decline in IT procurement protests at the GSBCA and GAO in the last few years. The number of protests filed with the GSBCA peaked around 1990 and has since declined. Most companies correctly see a protest as the option of last resort and will avoid the cost and contention associated with a protest if possible.

Regarding these findings, Judges Daniels and Parker observed that there has been a significant shift in the sophistication of protests in direct relationship to improvements in government procurement procedures. The GSBCA was established at about the same time that the government first began to use the "best value" approach for determining the winning offeror. Since there were (and still are) very few policies and guidelines for how to perform "best value" procurements, government agencies stumbled a few times in attempting to implement this "new" approach. The GSBCA decisions resulting from these flawed early "best value" procurements are the most thorough description of how to conduct future "best value" decisions. The decline in the number of protested "best value" awards in the last few years can be directly attributed to the government learning curve enforced by the GSBCA protest process.

The perception underlying the OFPP proposal — that large procurements are protested more frequently than small procurements — is supported by our research. In reality, most GSBCA protests are against relatively small awards. Of the 466 protests filed with the GSBCA in 1993 and 1994, only 34 were post-award protests of contracts over $10 million (one protest was filed with

the GAO in 1994).

B. GAO Statistics Overstate Delays Associated with Protests

A GSBCA case is much like a complex U.S. District Court case. It has discovery, motions practice, a trial in which witnesses are examined and cross-examined extensively, and a decision that can include remedies which make the time and expense of the litigation worthwhile. This process is completed — by law — in the unusually short time of 45-60 days. One of the principal criticisms of the Board is that it adds substantially to the time it takes an agency to award a contract. GAO's report, which is being cited as supporting these revolutionary changes, states that the average IT contract under $250,000 took 158 days to award, while the average contract over $25 million took *669 days* to award.

A 45-day protest process is significant to a contract which takes 158 days to award, but not to one which takes almost two years. The GAO report states that "protested contracts of $25 million or more took, on average, 222 days longer (41%) than non-protested contracts." Our examination of the IT contracts awarded in FY 1993 and 1994 is at odds with GAO's numbers.

Figure 1 in the appendix summarizes the disposition of the 35 protests of awards over $25 million in 1993-1994. The protests filed resulted in an average of a 45-day delay for the awards protested, and an average of 8 days for all contracts awarded. The 222-day delay asserted in the GAO report cannot be supported by the data we reviewed.

The GSBCA provided data from 1987-1994, which include settled and dismissed cases. The average time a protest is on the Board's docket is quite short, about 30 days.

In 1994, 119 out of the 179 protests filed (66%) were voluntarily

withdrawn, many within two weeks of filing. A substantial number of these protests, in the authors' opinion, could have been avoided if the agencies would simply have provided the losing offerors a thorough debriefing. The Federal Acquisition Streamlining Act (FASA) was a major step in the right direction — the number of protests filed should decline substantially as agencies implement procedures to assure thorough debriefings.

Four hundred and fifty-two major IT procurements awarded in FY 1990 through 1994 were analyzed and summarized according to the amount of time agencies needed to complete major IT awards. The results are summarized in Figure 2 (*see* appendix). While there is a relationship between size of the award and the duration of the procurement, it is apparent that the great disparity among procurement periods is not caused by protests or even the size of the award.

Data arranged by procuring agency (Figure 3, appendix), show that some agencies take, on average, twice as long to award contracts as other agencies with equal or larger procurements. This finding reflects the need for the government to focus its attention on improving the procurement times of agencies that exceed the reasonable average.

Figure 2 reflects the additional delay due to post-award protests on the portion of the procurement process that we could identify from public documents. Agencies frequently spend more time in the pre-Delegation of Procurement Authority (DPA) stage determining their requirements as they do in the post-DPA stage of the procurement process. The General Services Administration (GSA) studied 26 major acquisitions as part of their "Go for 12 Program"[7] and determined that, on average, agencies spent 21 months in the

[7] *See* AN INTERIM REPORT ON THE ELIMINATION OF UNNECESSARY BOTTLENECKS IN THE ACQUISITION PROCESS" July 1987.

preparatory phases (determination of needs, requirements determination, and alternatives analysis) and 17 months in the actual procurement process.

The 17-month average procurement process corresponds to the acquisition times we identified; the 1987 average is consistent with the data summarized in Figure 3. Since the average time required to complete recent IT contract awards has not changed from the period the GSA studied, it is reasonable to conclude that the preparatory phases also take roughly the same amount of time now as they did then. For the awards summarized in Figure 2, this would mean that the 585-day average required for contracts over $1 billion would require an additional 723 days for the preparatory phases.

Delays do occur, and agencies suffer from them. The most significant causes of delay, however, have little to do with the protest or the Board's handling of a protest. If an agency conducts a flawed competition, and the Board overturns the decision, weeks and sometimes months are spent repeating what was done wrong in the first place. Agencies that object to fixing what they broke have a problem. But the burden of the solution should be on those who caused the problem.

III. THE ADMINISTRATION'S PROPOSAL WOULD UNNECESSARILY FRUSTRATE PROTESTS AND REMOVE PROTECTIONS

A. The Proposal Fails to Fully Appreciate the Importance of Bid Protests

If the government bought goods and services on the open market like everyone else, it would be just another buyer, without special rights or privileges. But the procurement system, as codified in the Federal Acquisition Regulation (FAR), is designed to protect the government from many of the

dangers and pressures of the marketplace, and to protect offerors from unreasonable and illegal government decisions.

All of these rules — and the long period it takes for the government to make an award decision — make competing for IT contracts very expensive. Companies invest enormous financial and human resources in preparing and negotiating proposals. These costs are acceptable to businesses if the competition is fair, but when a company believes it was wrongly denied a contract, a protest results.

The federal procurement system is enormously complex. Like the tax code, it reflects every socio-economic preference, every protection against deceit, and every check and balance Congress can devise. Moreover, the procurement laws and rules place tremendous power and discretion in the hands of procurement officials who choose who wins and who loses billions of dollars of contracts each year.

With all of these checks and balances in the government's favor, only one check truly protects the businesses it deals with: the bid protest process. If policymakers only knew what the June 1994 report of the Administration's team of experts reported, they would believe that protests are the reason why agencies don't make tough decisions, why they often pass up leading-edge technology, and that protests are often used by incumbent contractors simply to delay having the old contract come to an end. Apparently proponents of this change believe protests lead to these negative consequences, as reflected in the NPR Working Group's report.[8] For example, OFPP Administrator Dr. Steven Kelman said in his February 28, 1995 testimony to the House Government Reform and Oversight Committee:

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[8] *See supra* note 1.

> [I]nnovation and creativity are being stymied. Excessive protests are one of the most important barriers to innovation . . . information technology is the most troubled area of government procurement. Thus, excessive amounts of litigation have not prevented the problems from being worse than in any other area of government contracting.

But all too often, the government says one thing and does another or evaluates proposals so poorly that the decision to award a contract is nonsensical. Contractors who may have spent hundreds of thousands or even millions of dollars preparing a proposal often find themselves losing a contract they should have won because the agency either didn't abide by the terms of the request for proposals (RFP), or violated some other regulation designed to make a competition fair.

The courts have described the government's duty as an implied contract to evaluate proposals fairly and in accordance with the terms of the competition.[9] Protests, in court or otherwise, are the only means for the bidder to enforce their rights under such a contract.

If no RFP's were poorly written, if all technical evaluations were done correctly, and if incorrect price evaluations were never performed, protests would not be as significant. But critical mistakes occur, particularly in the largest procurements, even when experienced, senior personnel are directly involved in the award. In short, protests are necessary because the government sometimes does a very poor job of awarding contracts and would probably focus less effort on the procurement process if the threat of a protest was eliminated.

Government agencies view compliance with many of the FAR's

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[9]*See, e.g., United States v. John C. Grimberg Co.*, 702 F.2d 1362, 1367 (Fed. Cir. 1983).

requirements as a hindrance to streamlining the buying process and greater efficiency. Incidents of cronyism, however, do occur, and institutional bias in favor or against certain companies does exist. Without protests, companies would only be able to judge whether they lost fair and square by the assurances of the same government officials who directed the evaluation. Companies have no other recourse to remedy an unfair loss.

The outcome of procurement reform will have very significant economic consequences. The government spends $25 billion dollars a year on information equipment and services. Winning or losing a single contract can determine whether even a Fortune 500 company has a profitable year. If bidders cannot rely upon being treated fairly, they will withdraw from the market. Without the benefit of their competition, the government will pay more and get less for the money it spends on technology. A system that reviews awards that may be illegal or flawed must be fair and efficient, or consumers, the government, and the companies will all lose.

B. The Proposal Overlooks the Merits of the GSBCA Process

The Administration's proposal seems to proceed from its own conclusion that bid protests at the GSBCA are the cause of most of the problems in IT procurements. But the GSBCA protest jurisdiction was established when Congress recognized the other remedies — particularly the GAO protest — were inadequate.

1. *A Highly Technical Field Requires Specialized Judges*

Information technology procurements involve unique facts and issues. When "best value" decisions are made on the basis of the terms of a software license or on which software package is more "user friendly" than another, a

trier of fact — be it the district court judge or the GAO hearing officer — is almost always dealing with concepts for which he has no experience or training.

A protest system with the GAO as the primary arbiter such as the one proposed would be flawed in two ways. First, the GAO hearing officer is not well prepared to handle complex technological issues. Second, and more importantly, in court or at the GSBCA, the protester can obtain the facts and present live testimony to the trier of fact. At GAO, discovery is almost non-existent, and the government controls the hearings. The protester cannot compel the production of documents or the testimony of witnesses who may be the only source of information on a key issue.

The GSBCA is a forum without these difficulties. Judges on the Board are immersed daily in technical issues dealing with IT, and have a host of colleagues to assist in their understanding of complex issues. Those litigating before the Board do not have to start at the level of teaching the FAR to the judge before presenting the merits of the case. This is an enormous advantage for the intervening awardee as well as the protester.

2. *Suspensions*

Another major feature that serves to protect the rights of protesters is that the GSBCA, like the district courts, can compel an agency to stop performance of the contract during the protest period. Agencies can, and often do, override GAO suspensions. In a March 1, 1995 interview, Chief Judge Daniels said, "Our ability to suspend contracts allows us to fashion real remedies. Without the ability to decide a suspension motion, the Board's effectiveness would be greatly reduced."

The importance of the suspension cannot be overstated. The trier of fact will always have to balance the harm done to a successful protester against the

government's liabilities if an award is cancelled. Since its inception decades ago, the GAO bid protest has considered this perhaps the most important consideration in deriving a remedy for a successful protester. In cases where performance is continuing, a protester's victory is usually Pyhrric.

Suspensions are routinely granted at the Board, which also has the power to enforce them. Under the Administration's proposal, this would also be changed. Agencies would be able to override a GSBCA suspension as easily as they can at GAO. It would invite agencies to foreclose the Board's power to grant relief of any value to the protester.

3. *Availability of* De Novo *Review*

Another element of the proposal would change the Board's standard of review from the *de novo* standard of the Brooks Act to the "rational basis" test first described by the D.C. Circuit in one of the early unsuccessful bidder cases, *M. Steinthal & Sons v. Seamans*, 455 F.2d 1259 (D.C. Cir. 1971). The "rational basis" test is rooted in the Administrative Procedures Act (APA), the law providing district courts their powers to review an agency's action. 5 U.S.C. § 702 *et. seq.*

Under the APA, the courts examine an administrative record and decide whether an agency has made a rational decision on the basis of the facts it knew at the time. *Id.* One difference is that in a *de novo* review, the Board can consider evidence that was not available at the time of the award. In the "rational basis" test, a decision stands unless it is contrary to the evidence or violates a law or regulation.

Both the administration and government officials seem to believe that the GSBCA's use of the *de novo* review is responsible for many of the problems ascribed to the protest process. They assert that the GSBCA's use of *de novo*

review should be eliminated in order to somehow improve the protest process. Two separate and distinct issues are embedded in the government's concept of *de novo*: (i) full discovery, including depositions, interrogatories, and a hearing on the merits; and (ii) the court's willingness to consider evidence that the deciding official did not consider.

The Board's discovery procedures would be curtailed in the administration's proposal. Its supporters have stated that discovery should be virtually eliminated, and the Board's review of a procurement should be limited to the administrative record of the agency's decision. This means that agencies will be careful not to create a document trail which would allow a trier of fact to find evidence of bad decisions or improper behavior. Without depositions, agencies could effectively deny access to the facts. This already occurs in some GAO proceedings when the government selects the documents it believes will not damage its case and labels that the "record."

GSBCA procedures clearly provide for more liberal discovery than the procedures the GAO follows. Essentially, they provide procedures similar to what the protestor would get in federal court. The government's proposal to limit discovery to the documented record as prepared by the procuring agency is akin to denying police the ability to use radar and laser speed detectors — leave the laws in place but limit their ability to enforce them. If a protester can find evidence of a significant failure on the part of the government during the procurement that would affect the award decision then the decision should be overturned. The issue here is not the protester's rights — the issue is the American taxpayer's right to expect government agencies to follow regulations when awarding contracts.

Despite administration officials' statements, GSBCA judges do not put themselves in the place of the procurement authority. A careful reading of

GSBCA decisions shows that protests are granted only when the protester clearly proves that the agency violated a regulation or policy in such a way that the violation affected the selection of the winning offeror. The *de novo* vs. rational basis debate is a curious one, particularly in light of the Board's ruling in *Grumman Data Systems v. Department of the Air Force,*[10] where the Board said that it could consider an expert's *post-hoc* analysis in support of the government's decision. In that case, an experts' new version of a cost-technical tradeoff decision was considered in finding the award decision valid. As Judge Parker said, "[t]he *de novo* standard helps the government more than the protester. If the government's rationale doesn't hold up, experts can be brought in to prove the government was right."

4. *Available Remedies*

The remedies available at the Board can make the price of the protest worthwhile. A successful protester not only may have the award set aside, but it also may recover attorneys' fees. The risk in a protest is that the litigation cost which, in larger cases, usually exceeds $100,000 (and can reach two or three times that amount) can easily exceed the benefit of bringing the case. Even if the protester wins, there is no guarantee that it will eventually get the contract. A preferrable change of the remedies within the power of the Board would be to conform to those of the district courts or the Court of Federal Claims.

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[10]See *Grumman II*, GSBCA 11939-P, 93-2 BCA ¶25,733 (1992)

C. The Proposal Contains Potentially Damaging Procedural Changes

Three procedural changes contained in the Administration's proposal seem intended to deter companies from protesting government decisions and would remove important protections for competing companies. The first would allow agencies to demand that bidders certify that they would give up their protest rights in all but the internal agency forum. In effect, this would allow agencies to coerce bidders into giving up their rights to bring their protest to the GSBCA or the courts. Agencies would have the power to make winning a contract contingent on waiving protest rights. The only conceivable purpose of this proposal is to make sure that either a company waives its protest rights, or that the only competitors with a chance of winning will be the ones willing to waive their rights.

The second change would give the agencies authority to proceed with contract awards at their discretion despite the filing of a protest. The remedy available to a successful protester frequently depends on whether the awardee has performed some or all of the contract work. One of the principal reasons that the GAO and the GSBCA can grant a meaningful remedy for the protester is that the agency's actions are frozen in place, reducing the government's liability if they have to cancel an award. The effect of this change will be that the successful protester will have only a hollow victory. With contract performance continuing, the government will argue against cancelling the award because of its termination liabilities.

The third change would prevent unsuccessful protesters from recovering their costs as part of normal overhead or general and administrative expenses. This is just one more example of the price companies pay for the privilege of doing business with the government. Add it to the list which now includes

lobbying expenses, advertising, and a host of other normal business expenses which the government chooses not to pay, and which come out of profit. This would be a significant penalty that would discourage many small company would-be protesters from asserting their rights.

D. One Prudent Reform: Eliminating District Court Jurisdiction

The Administration's proposal would take the intelligent step of divesting federal district courts of jurisdiction over protest matters. The many efforts to alter the district courts' jurisdiction over the past few years have created much confusion. The Court of Federal Claims, if given the resources and the remedial powers needed to do the job, could be an adequate replacement. But the court's remedial powers now only extend to pre-contract protests. The court can readily substitute for the district courts only if its powers are extended to post-award matters, and its expertise is developed to handle IT cases. The gains in uniformity of law and expertise of the court should outweigh the inconvenience of having all of the cases heard by the one court.

IV. WORKABLE SOLUTIONS TO BID PROTEST PROBLEMS

A. Addressing Abuse of the Protest Process

Many opponents of the GSBCA process point to alleged abuse as the reason for mandating change. But how much abuse is there? Dr. Kelman said in his February 28, 1995 testimony:

> [T]he system for hearing bid protests of information technology procurements at the GSBCA is not working. Incumbent contractors who have lost a re-competition routinely protest, simply to delay the start of the new contract so the old contractor can continue to receive revenues while the litigation is going on.

Little evidence exists to support this statement; however, there was an interesting pattern in the frequency with which companies filed protests: two relatively small companies account for a disproportionate number of the protests filed. In 1993, one company (and a related firm) filed 56 protests (almost 20%) out of a total of 287 GSBCA protests filed, while another company accounted for an additional 14 protests (5%). In 1994, the first company filed 17 protests (9%) and the other company filed eight protests (4%). No large government contractor comes even close in the number of protests filed during the same period.

Firms that irresponsibly protest any and all awards they do not win cause the government additional effort and delay. What must be examined is how to discourage irresponsible protests without discouraging companies that legitimately believe that they have been unfairly treated from protesting. The Administration's proposal will not be effective in this regard and in fact may cause more harm than good.

The proposal includes three ideas intended to discourage what the administration labels frivolous protests:

- allow GAO and GSBCA to impose some form of financial liability for protests they determine are frivolous;
- do not allow companies to include protest costs for protests that are not granted in their overhead pools; and
- require companies to first protest to some form of dispute resolution forum to be set up by each agency before the companies can file with the GSBCA or GAO.

The "frivolous" protest is a very difficult concept to define. If the GAO or GSBCA were to attempt to impose financial or other sanctions for protests they determined to be frivolous, this would lead to *more* litigation rather than

less. The only firms that would actually suffer penalties for filing frivolous protests are those that cannot afford to or choose not to hire experienced counsel.

Disallowance of protest costs is a regressive penalty very much like a sales tax. The smaller firms that file one protest in a year would experience a proportionately much greater economic loss than the large firms that can more readily absorb the cost of litigation. Firms that choose to file protests using in-house personnel (including both of the frequent protesters mentioned above) would not be discouraged from filing protests because their protest costs are in salaries rather than legal fees that can readily be excluded from overhead.

If the Administration's proposals will not discourage the few irresponsible firms from filing a disproportionate share of protests, is there another solution? Two approaches could be examined. Both involve public identification of the firms that abuse the protest process. Government agencies should consider "propensity to protest" as part of the past performance of an offeror just as private industry would consider troublesome behavior on the part of a supplier when awarding new contracts. This would call for very subjective judgements of an offeror's propensity to protest and the relative merits of past protests. Industry in general does not condone irresponsible protests and some peer pressure could be brought to bear on firms if others in the same market were made aware of this excessive behavior.

While the idea of an independent forum in each agency to hear protests appears to offer a streamlined, inexpensive way to resolve protests, this process will lead to longer delays and more disruption, costing the government more in resources than the current protest process. First, government agencies would have to establish procedures and policy for these forums and assign senior personnel to this effort. This process will lead to many studies and much

time expended that makes no contribution to the agency's mission. Most agencies cannot afford to have their senior personnel tied up in protest resolution. Also, unless a firm has been coerced into waiving its other rights it can still file a protest at the GSBCA or GAO. The agency process will add to the delay caused by a protest.

B. Appropriate Solutions

The bid protest process is in need of reform, but most of the features of the GSBCA should be preserved if fundamental fairness of the contract award process is to be maintained. The key to reform can be found in the work of the Section 800 Panel, which recommended that GSBCA procedures be expanded to cover all procurements in all agencies.

To accomplish this, policymakers can consider the following ideas:

1. GSBCA's jurisdiction could be expanded to all procurements over $1 million. It could be given the authority to grant any remedy, including directed awards, available in the Court of Federal Claims;

2. GAO could have exclusive jurisdiction over procurements under $1 million. GAO's procedures could be conformed to the GSBCA's, and suspensions of procurements made a decision of the GAO;

3. When considering past performance in awarding contracts, agencies should give lower grades to companies which file frivolous protests. If debriefings are improved and a company has more than a few protests which are not settled but voluntarily dismissed before trial, that should be considered evidence of frivolous protests;

4. The Court of Federal Claims should have jurisdiction, *both pre- and post-award*, over any protest matter. Limiting the court to pre-award cases makes no sense. The provisions establishing the Court's jurisdiction could give it the power to grant any appropriate remedy both before and after award; and

5. Agencies such as the U.S. Postal Service that are not now subject to CICA, the Brooks Act, and other procurement law could be covered by those laws so that the agencies are held to the same

standard of performance and bid protest remedies as are others buying for the government.

CONCLUSION

The problems with the IT procurement process cannot be solved by throwing away the bid protest. The bid protest system, for all of its faults, remains the one viable means of enforcing the fairness of a contract award. As Churchill said of democracy, the bid protest is the worst system to enforce the rules of competition — except for all the others.

APPENDIX: Bid Protest Data

IT CONTRACTS AWARDED IN FISCAL YEARS 1993 & 1994

AWARDED VALUE RANGE	AWARDS	PROTESTS	PER CENT PROTESTED	OUTCOME	NUMBER	AVERAGE DELAY (Days)
> $1,000M	4	0	0%			
> $500M	8	2	25%	REAWARDED	1	125
				DENIED	1	87
> $100M	36	9	25%	DENIED	2	59
				WITHDRAWN	4	52
				SETTLED	1	30
				GRANTED	1	81
				DISMISSED	1	28
> $50M	32	6	19%	DENIED	3	81
				WITHDRAWN	3	35
> $25M	43	8	19%	DENIED	2	66
				WITHDRAWN	6	24
> $10M	84	10	12%	DENIED	2	60
				WITHDRAWN	6	26
				SETTLED	1	14
				PENDING	1	
TOTALS	207	35	17%			
				TOTAL DAYS LOST		1,588
				AVERAGE PER PROTEST		45
				AVERAGE PER AWARD		8

FIGURE 1

Figure 2

Figure 3

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Electronic Industries Association
National Security Industrial Association

Statement for the Record

House Committee on Small Business

Hearing on Procurement, Small Business View of H.R. 1670

June 29, 1995

On behalf of the members of the Electronic Industries Association (EIA) and National Security Industrial Association (NSIA), many of which are small and medium sized business, we are pleased to submit our views on H.R. 1670, the "Federal Acquisition Reform Act of 1995."

EIA and NSIA recognize a need for fundamental reform of the Federal acquisition process. We were very encouraged by the enactment of the Federal Acquisition Streamlining Act of 1994 (FASA). Our members believe that FASA represents the most comprehensive government-wide acquisition reform effort in over a decade. While FASA began the acquisition reform process, we firmly believe that additional legislative reform and diligent FASA implementation oversight are warranted.

H.R. 1670 is a vehicle for further congressional action on acquisition reform. EIA and NSIA value this opportunity and these discussions. In particular, our members strongly support Titles II and III of H.R. 1670. Title II completely exempts commercial items from the onerous cost or pricing data requirements of the Truth in Negotiation Act (TINA); Title III calls for greater reliance on the private sector, and eliminate non-value added administrative burdens on contractors. These provisions will have a positive impact on industry, including encouraging small businesses and commercial items suppliers -- that otherwise might not do business with the government -- to participate in the Federal marketplace.

With respect to Title IV of H.R. 1670, reform of the bid protest system, EIA and NSIA have joined with other associations to develop recommendations offered by

the multi-association Acquisition Reform Working Group (ARWG)*. These comments espouse a four-phase approach which includes: 1) Prompt and detailed debriefings [as called for in FASA]; 2) Objective, senior-level agency review; 3) Board-supervised alternative disputes resolution (ADR) process; and 4) U.S.B.C.A. a quasi-judicial process.

Finally, with respect to Title I, the alternative "maximum practicable" competition language, members of our organizations, large, medium and small, all agree that it is a waste of time and valuable resources to compete for Federal procurement programs in which they have no viable chance of winning. Competition in the Federal marketplace should be aggressively pursued, but when a contractor may not be in a viable position to win a contract award it needs to be told promptly, be given a thorough debriefing, and decide whether to pursue the procurement.

ARWG has taken a position which supports the concept of providing government agencies with the option of conducting procurements utilizing something less than "full and open competition," as traditionally defined, while still maintaining the key attributes of full and open competition. While the current congressional debate seems to be focused on the terminology of "full and open" vs. "maximum practicable," EIA and NSIA are focusing on the goals of Title I of H.R. 1670. As we understand it, Title I offers ways to reduce the time in which contractors are engaged in the bid process, potentially wasting precious resources. EIA and NSIA applaud this goal. Here, too, EIA and NSIA have joined with other associations to develop recommendations to Title I which are offered as a starting point for discussions on refining the Title I approach. These detailed ARWG comments are attached.

EIA and NSIA hope that the Small Business Committee will find merit in the recommendations offered herein and that you will work with the sponsors of H.R. 1670 and industry to continue the critical process of acquisition reform.

* **ARWG members include**: Aerospace Industries Association, American Defense Preparedness Association, American Electronics Association, Contract Services Association, Electronic Industries Association, National Security Industrial Association, Professional Services Council, Shipbuilders Council of America, and the U.S. Chamber of Commerce.

EIA/NSIA Testimony for the Record **ATTACHMENT**

ACQUISITION REFORM WORKING GROUP (ARWG)
RECOMMENDATION ON H.R. 1670 - TITLE I

o **Pre-Offer Phase**

1) Agency must post notice of intent to issue a solicitation; notice includes a reasonably detailed synopsis of requirements as well as the criteria on which both early narrowing and final source selection will be based. Notice also specifies that the Agency will require brief statements of interest/qualifications from firms wishing to participate in the solicitation, and that all parties submitting such information will be notified by the agency if the agency believes the firm has a reasonable chance of prevailing. The notice must also include an announcement of any agency intent to seek to limit the competitive range in the post-offer phase, and the criteria on which such a downselect decision will be made.

2) All interested parties must respond to the notice with brief synopses of qualifications and interest addressing the agency's evaluation criteria.

3) Agency conducts initial evaluation of responses of interests and capabilities and issues advisory opinions (regarding a firm's competitive position) to all firms that submitted such responses, based on the baseline criteria contained in the initial notice.

4) Agency issues formal solicitation to all companies who, based on the preliminary screening, are deemed to have a chance of success. Any company that was notified it was not likely to prevail, but still wishes to pursue the procurement, may request a solicitation and proceed. Offerors who did not respond to the initial request for statements of qualifications and interest may also still request solicitations at this point, but the government has no obligation to consider their proposals.

o **Post-Offer Phase**

5) Agency may evaluate proposals and eliminate certain offerors from the solicitation (according to criteria specified in the notice of intent and solicitation) as long as there remain no fewer offerors in the competitive range than announced in the notice of intent, and providing that immediate debriefings are made available to those offerors who are eliminated. This elimination from the solicitation decision is protestable.

In addition, while ARWG believes no changes to a solicitation should be allowed after it is issued, there should certainly be none allowed after a downselect.

RATIONALE: ARWG believes this approach carries many advantages and can be tailored to be used on both large dollar procurements with relatively short bidder's lists, and for smaller dollar procurements and commodities purchases that may attract literally hundreds of qualified offerors.

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STATEMENT

OF THE

COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

ON

PROPOSED FEDERAL PROCUREMENT REFORM LEGISLATION

JUNE 29, 1995

HOUSE COMMITTEE ON SMALL BUSINESS

CCIA
Computer & Communications Industry Association Washington, D.C. 20001
666 Eleventh Street, N.W., Sixth Floor (202) 783-0070 Facsimile: (202) 783-0534

June 29, 1995

The Honorable Jan Meyers, Chairman
and The Honorable John J. LaFalce, Ranking Minority Member
The Committee on Small Business
U. S. House of Representatives
2361 Rayburn House Office Building
Washington, DC 20515-6315

Dear Madam Chairman and Mr. Ranking Minority Member:

My name is Edward J. Black and I'm President of the Computer & Communications Industry Association (CCIA). Thank you for inviting me to survey the federal procurement world and to provide you a background perspective on some issues that should be of jurisdictional interest, so far as Small Business is concerned. I respectfully request that this letter and accompanying statement and attachments be incorporated in the Hearings Record of your deliberations covering H.R. 1670, the "Federal Acquisition Reform Act of 1995." CCIA is an association of companies which represent all facets of the computer and communications industry. Collectively, our members generate annual revenues of nearly $190 billion; many are substantially involved in the Federal marketplace. We have many small businesses as members and among our charter practises is assistance to entrepreneurial companies striving to enter the American economic mainstream.

I have been heartened to learn of your resistance to provisions of law that would restrict the opportunity of many firms to participate in federal procurement, lessen the standard of competition, confer unprecedented powers upon the Office of Federal Procurement Policy, and allow huge pilot programs to begin before the FACNET mechanism, which would alert business to participation opportunities, is in place. **I respectfully ask that you continue to stand strong in favor of full, free, and open competition and its required *"de novo"* standard of review at the GSBCA in order to deliver what a procurement standard of "maximum practicable competition" cannot insure: FAIRNESS--as you consider H.R. 1670 and other free-standing procurement bills. CCIA will stand with you.**

CCIA testified earlier this year before the House Government Reform and Oversight Committee and I testified in May before a joint meeting of the House Government Reform and Oversight and National Security Committees on these issues. Because it should be included as background for your Hearing Record, both my written and oral testimony are attached. Furthermore, should the Small Business Committee decide to consider these or other issues associated with H.R. 1670 in greater depth, I would be pleased to provide you with the Computer & Communications Industry Association's perspective.

We have critiqued H.R. 1670, and that is necessary; but we actually owe its framers a debt of gratitude for starting the process. And we hope that, by standing on their shoulders, all of us can see a little further into the future and move toward constructive activity. There is work yet to be done, e.g., the actual day-to-day regulatory operation of FASA I. Even with constricted budgets and limited taxpayer tolerance, it is critical that the federal procurement system be perceived to run fairly and fully competitively, as well as efficiently, and cost effectively. The real legislative issue boils down to: "Can the public and private sectors ever completely cooperate with one another in procurement while absolutely protecting one another's public and private fiscal stewardship responsibilities? And, if so, how?" The remainder of our submission describes some of the strengths and weaknesses of federal procurement policies and practices, and outlines points for consideration when creating a prescription for healthy reforms.

Thank you for the opportunity to be of service to the Small Business Committee. If I can help you further in any way, please call me at (202) 783-0070 or write to me at CCIA's return address. It has been a pleasure to provide this perspective on federal procurement to you. I hope it is useful.

Sincerely,

Edward J. Black, President
Computer & Communications Industry Association

FEDERAL PROCUREMENT: A DESCRIPTION OF STRENGTHS AND WEAKNESSES; AND POINTS TO CONSIDER WHEN CREATING A PRESCRIPTION FOR HEALTHY REFORMS

GENERAL BACKGROUND: THE CURRENT SITUATION

Last year (1994) the Congress passed, and the President signed, a far reaching, but carefully crafted law, the Federal Acquisition Streamlining Act of 1994 (also known as FASA I). This occurred because several years ago a consensus developed that there were important changes that should be made in the way the federal government buys our industry's goods and services. Though there has been no opportunity yet to practise these recently enacted reforms, and, therefore, no opportunity to evaluate their effectiveness, or their impacts upon business, there are again voices clamoring for a new round of legislative changes. Among the new legislation is H.R. 1670; but, unlike FASA I, 1670's proposals have not been the result of wide-spread consensus.

CCIA strongly supported FASA I last year and still believes that many of its provisions will significantly improve the Government's ability to acquire high technology products offered by all vendor communities: small business, small/disadvantaged business, and large business. But, even last year we warned that FASA will change numerous aspects of federal contracting and it will take many months for the procurement community to absorb and adapt to them.

THE NEED FOR INCREMENTAL IMPROVEMENT

For these reasons, we testified in all fora into which we were invited that FASA I implementation should supersede and precede any new procurement legislation. Implementation needs to proceed at a measured, deliberate pace, and adequately and accurately feed back to Congress the plain words and ostensible meaning of new regulations for "straight up" comparison with the plain words of the legislation. We also testified that considerable time, money, and effort would be needed to educate the entire procurement community to the Act's behavioral changes, and until the changes are properly utilized in bids, federal procurement will continue to appear "loosey-goosey" and, therefore, seem in need of more changes than it will after FASA I's changes are actually implemented.

INCREMENTAL IMPROVEMENT HARD TO "SELL"

Our pleas for legislative discipline and "abstinence" have fallen on unconvinced ears; and, among the greatest threats remains lack of proper oversight of FASA I implementation because of multiple legislative and administrative rushes to enact significant, new "reform" legislation--much of which would impact still-undigested FASA legislation being translated into regulation not yet on the street. The Administrator originally had it right when he told Federal Computer Week that "It could be very easy instead of holding our nose to the grindstone... [to be] diverted to a legislative battle that might generate a lot of heat and not light." (FCW, November 7, 1994, p. 6.) Unfortunately, few, if any noses are on the grindstone and he and others are hot with new legislative ideas to revamp federal procurement. Some of them would only seriously weaken the system's accountability and fairness, but many are downright dangerous, and these packaged epidemics of broad procurement changes have completely distracted Congress from putting actual effort into properly evaluating how accurately the laboriously crafted FASA reforms have been put in place, what their various impacts are, what needs more work, and what doesn't. The picture exhibits more games and gamesmanship than serious legislative exercise. One would think legislative approaches to such complex and sophisticated systems would be incremental and systematically undertaken, but that is at variance with fact.

If our procurement system is like the patient, many executive and legislative "Reform Forces" are behaving like walk-in doctors and interns whose original "treatments" first put the patient into the hospital, and who now, day and night, are each prescribing new treatments-- based upon audience participation--for the helpless patient, without professional consultation or without waiting to see if their previous treatment is working. In the rush to "fix" the patient no treatment--including voodoo, snake-handling, leeches, and mind-molding ("There are no procurement problems; they're only in our attitudes")--is unrecommended or untried. Even making all of the body uniformly ill is a "reform" being confused with restoring unhealthy parts to health. Notes on the patient's chart show unremitting changes in "treatment"--most recently assaulting healthy parts of the system that, up to now, have been functioning properly, such as the GSA Board of Contract Appeals and the Brooks Act. Although no one really knows what diseases the patient has, but one of these days something's going to work; and, whoever treated him last will get the credit for "fixing" him! One would think "reform" of

the procurement system would be approached in a much more careful, coordinated, and centralized manner than it is! However, we do not expect others to believe as we do; and, even as I write this to you, there are those trying to undo legislatively the procurement law changes made since 1949--the Brooks Bill, the FIRMR, and the GSBCAand to do away with the GSA and the GSA-DoD Memorandum of Understanding, and revert to the procurement power balance, practises and procedures in place before the Korean War! There's a lot of "murmuring" going on!

OFPP PROGRAMS STILL COUPLED TO "FACNET?"

Sweeping power was conferred by FASA I upon the Administrator of the Office of Federal Procurement Policy to conduct procurement test programs, coupled to FACNET availability, for which he may "waive *any* provision of law, rule or regulation necessary to implement a demonstration project successfully." This means *all* of this country's laws: the Trade Agreements Act, the criminal code, civil rights laws, civil service rules, and even newly passed provisions of the Contract with America, may be waived by decision of the Administrator. Each "demonstration project" could last five years or *more*. We don't think that he would actually intentionally misuse such sweeping powers, but he does have a grand theory to eliminate huge portions of procurement rules and regulation, keeping rules in only two areas: multi-member source evaluation boards, and written justifications of source evaluation decisions. This FASA I provision, then, will allow one man to make sweeping changes in our system of laws. The current Administrator's approach to procurement is laid out in this blueprint from his book, Procurement and Public Management:

> "I favor experimenting with bold changes in the system to increase the judgment that public managers may exercise. I would urge statutory authorization for experiments in eliminating most procurement rules in favor of a regime with only two broad procedural requirements--written justification for each procurement decision, and multiple-member evaluation panels to reach decisions." [Page 91; footnote omitted.]

There are at least three (3) questions that are appropriate here: (1) Given past, chronic abuses of federal power, authority, and responsibility that have wasted billions of tax dollars and marred countless large and small procurements, is there fiscal stewardship comfort regarding the relatively *laissez-faire* management of the large test programs? (2) Given the importance of "best value" and "past performance" in procurement evaluation schema, are the likely chances of small

and small/disadvantaged businesses' significant roles and dollar participations in the Pilot Tests in line with your expectations for them? and (3) Where's FACNET?

DE-REGULATION FROM A SYSTEMS PERSPECTIVE

The Administrator would return us to a federal procurement Garden of Eden, so why does CCIA challenge his efforts, and others', taking us back to a time free of original sin? Because federal procurement never enjoyed such a time, and cannot. Just as, logically, one can never deduce a positive conclusion from an infinite set of negations, neither can federal procurement achieve a positive state of excellence by negating the rules that have systematically brought order from Chaos. Rules are, among other things, principles of specification and specificity--and their absence allows ambiguity, sameness and entropy back into any system. Furthermore, rushing headlong into large-scale deregulation of the federal procurement process is not wise, because one must then assume that, even in a deregulated environment, players will always do the right thing. They will not. At best, they will play to win under the rule set applicable at the time.

ELIMINATING RULES: NOT ALWAYS THE WISEST CHOICE

The fewer the rules, the greater the likelihood the stronger will win more and more often; and, deregulated (i.e., absent rule sets), the strongest will simply use power until they win. The federal government spends about $200 billion annually to acquire needed goods and services. Imagine running into a deregulated procurement process worth $200 billion! Furthermore, trusting government to do the "right thing" while "passing out" $200 billion is not wise. We all realize the need to streamline the system while making it less costly and more efficient, and the *status quo* is not an option; but changing it by novelties and eliminating applicable legislative and regulatory "brakes" and oversight against only makes it easier and quicker to get rid of the $200 billion--by "half-winking at" abuse, fraud, graft, and corruption.

WHAT OTHER INITIATIVES ARE ACTIVE?

Other procurement environment "hot rushes to reform" include eliminating the GSBCA in favor of CIOs (Corporate Information Officers), and the Canadian Pilot Test in which there would be close cooperation between the federal government and a few selected vendors. In our judgment it is not a good idea to replace a useful, politically neutral venue for redress of grievance with an OMB-based, politically

driven CIO. First, of all, an Information Officer isn't the judge needed by a system sometimes run with equity. Second, at the macro level, what incumbent President would ever lose reelection with a $200B "war chest" under the control of his politically appointed CIO? The idea of CIOs (as CIOs only) was first offered by then-Congressman Frank Horton several years ago (CIOs were then only IRMs in new clothing) and maybe a pretty good idea, so add 'em in. But do away with the politics! Let the CIOs manage technology (IR) acquisitions ! And leave the GSBCA alone!

THE CANADIAN TEST PROGRAM

How about the Canadian Test Program? In it a few vendors are government's favorite contractors and suppliers. It's assumed to be a good program by its Senate sponsor and the companies who recommended it: Is it? First, it's a Test Program--even in Canada. At a minimum, the test should be completed, with results analyzed and evaluated, before doing anything. Legislators and staffs should not be rushing to bake U.S. cookies with a Canadian recipe before knowing how the recipe behaves and what quantities at what quality it can produce under what conditions. Second, it assumes not only that government agencies and the government's few selected vendors will always do the right thing, but also that what they do will be good for Canada. That's quite an assumption for Canada to make; and, it would be even more troublesome in the United States. Think of the thousands of small businesses that would never even have the opportunity to compete! And, with limited competition, what happens to the considerable fiscal benefit to the government that accrues from widespread competitive discounting? Worst of all, what if the few prime vendors, so-called "men of good will," favored by the Program don't do what's right? Who is the person who's going to advocate the cause of the "run over" little guy that got in the way of one of the government's prime suppliers, or worse yet, "their" CIO?

PRECIPITOUS REFORM AND THE USE OF POWER

CCIA doesn't challenge the OFPP or Administration or legislators for saying some things are a mess; but, we do challenge and part company with them when they say they can clean the whole mess up in a single *grande geste!* "Quick fixes" are seductive: everyone, for instance, is in favor of "streamlining" for greater governmental efficiency. But against what baseline? And, when efficiency is purchased at the expense of proper stewardship of public funds; of politicization of the procurement system; of full, free, and open competition; of a mechanism for

properly redressing agency contractual problems arising from competition; and at the expense of the removal of fetters from Executive Branch power, that efficiency is not even in industry's interest. OFPP is showing broad willingness to assume the powers the White House and DoD are conferring upon it, but that willingness is not balanced across all the interests involved. OMB has unilaterally announced that no protests will be allowed on FACNET bids. But, all bids under $250 thousand are to be submitted via FACNET. In this case, OMB, acting without legal authority, is unilaterally taking away proper constraints the Legislative Branch has worked very hard to put into the federal procurement system. In doing so, OMB is saying that anyone getting into a less than $250K fight with the government, can't. So, does that need attention?

Well, isn't CCIA's a curmudgeonly posture? Don't we want to return to the procurement Garden of Eden? We do--when all men are men of good will and always do the good thing for the benefit of everyone else, including keeping the public trust. In short, when all men return to Eden, federal procurement will, too...but, not before.

ANOTHER PLEA FOR OVERSEEING FASA I REGULATIONS

In summary, our look at the procurement state of affairs would still seriously question the wisdom of enacting any comprehensive procurement package this year, and instead, ask you to insure that the Regulators properly implement the important reforms of FASA. Even at this early date, it's obvious that while many of the proposed FASA regulations conscientiously adhere to statutory intent, the Congress needs to look closely at a goodly number of significant differences in order to catch discrepancies between the law and the regulations implementing it before they're too imbedded in the FAR. One of the lessons to be learned from 1994-95 is that Congress should "look-see" to make sure regulations do what was intended by the law--before allowing regulation writers *carte blanche* authority to direct the entire government and vendor communities to begin using them.

DOES A HIGH STANDARD OF COMPETITION CAUSE PROCUREMENT PROBLEMS?

H.R. 1670 addresses federal procurement mistakes as if procurement law were the prime causative element responsible for inefficient procurements at higher costs than need be borne. It is not--and a bill eliminating "full, free, and open

competition" is not the answer to the "problem." The real causal situation that needs to be addressed is: How can contracting officers sufficiently capture, map, and convey requirements they are asked to meet and resolve in a manner that not only attracts everyone's attention but also provides sufficient information such that non-responsive and non-responsible vendors can efficiently be determined to be outside the range of responsive and responsible contractors, or can themselves "no bid," or can opt out of RFPs they cannot win at the earliest stage.

What already exists in law and regulation is sufficient to attract full competition across the entire range of small, small/disadvantaged, and large qualified vendors and to get all potential vendors to the "tent;" but the bill holds "full, free, and open competition" responsible for unqualified vendors getting "into the tent"--over and over. The first part of the sentence is true; the second part is not. "Getting to the tent" is different from "getting into the tent," so what's needed is use and enforcement of clear rules for entry, not legislative change.

THE "PROBLEM" IS ACTUALLY SEVERAL, COMPLEX PROBLEMS

But furthermore, the "clear rules" themselves would be only a derivative, not root causes, answer. The contracting officer's basic challenge goes all the way back to a culture with its own rules, traditions, and mores. **That culture can be accommodated or modified.** If you **accommodate** it, you need to conduct procurements in multiple phases: "qualifying round," "negotiating round," etc. If you choose to **modify** it, you must make it "OK" for the contracting officer to provide vendors with continuing pre-RFP and RFP "information flows" that address problem definitions, process statements, and the range of substance and mechanical elements so that he can increasingly and comprehensively definitize requirements for vendors continuously throughout the bid process while gathering his own information (related to inclusion in and exclusion from the group of "responsive and responsible vendors" finally selected to go "into the tent") **ahead of time**. Whichever you opt is your determination, but the current high standard for full and open competitive procurement in public policy is clear: **the system must allow all to look, while realizing all who look are not all qualified to play--only those who are fully responsive and responsible are, and it is they who get "inside the tent."** If the "bad behavior" problem, then, is "too many unqualified vendors in the tent," **the problem itself is evidence (1) that vendors who are just "shooting in the dark" (on the one hand) don't or can't separate themselves from the group of**

competitors (on the other) and (2) that the user allows them in. Neither is a consequence of the high standard of competition adhered to.

WHAT WOULD A SINGLE THREAD PROCEDURE NEED TO SUCCEED?

Another dimension of the solution to this problem would be not to relegislate the competitive process "from scratch," or conduct a procurement in phases, but to open a single phase completely to the types, varieties, dimensions, frequencies, and numbers and durations of communications that would be sufficient to eliminate the problem. Once the RFP is on the street, vendors need rapid, accurate information to make judgments about whether to bid or not--and, at the very same time the buyer needs access and exposure to evaluate the responsibility and responsiveness of prospective vendors. But, believe it or not, that's when the existing procurement system has a propensity to go virtually "radio silent." Communication becomes stilted and formal, everything is written or confirmed in writing, directed to and flowing through the contracting officer, slowly, and with ambiguous, incomplete, and not always useful responses collected over time and released *en bloc* to all vendors at once to insure no competitive advantages are conferred--at the very time information movement and management needs to be open, fast, complete, and useful! And, by the way, I'm not saying that contracting officers are guilty parties or are in any way at fault--they simply come into this culture as others do. (The truth is, no one seems to know who controls this culture; it's always "they.") **There are no laws saying this is the only way the government could transact business or that rules couldn't be changed; but, this way of doing business has always been considered** sacrosanct. The resulting block universe approach includes 2, 3, 4 or more months of virtual non-communication at the very zenith of a procurement cycle, absorbing the time that open communication and information exchanges could otherwise be used to bring truly qualified competitive vendors to the negotiating table, efficiently and with cleanest outcomes. How does one look at the alternatives? Well, a 2-step procedure would draw things out in time, but would be easier because it's in keeping with the ingrained culture. On the other hand, "Opening up" a continuous, single process would probably take less time **all the time** but would be unfamiliar and possibly harder, because it would go against the culture.

THE LONG VIEW

Eventually, under the press of economy, the agencies and OFPP will have to think "out of the box" and re-examine their long-held pre-suppositions about their entire set of overlooked cultural "undertows" that kill new approaches--possible time-lines, impediments, and flaws--then, they will re-engineer the whole process. Our private belief is that until this is done, you, the Congress, are going to be bombarded yearly by procurement "problems" outside anyone's responsibility and always "needing" new legislation to solve. Our hope is that the Congress will respond by getting past the familiar procurement "superstructure" down into the underlying and supporting decks, open them to "sunshine," and insist that the power politics, and types, varieties, dimensions, frequencies, numbers, and durations of information flows, mechanisms, cultural predispositions, and processes be reengineered to resolve fiscal and other public responsibility problem(s).

"POSITIVES" YOU TEND TO OVERLOOK

CCIA agrees there's a need for further refinements in the procurement system. However, CCIA doesn't agree that federal procurement is one long litany of delays and development snafus always politically attributable to somebody else's legislation. There are some very good federal Information Resource Managers that are going to "take the heat" for a new legislative record justifying the brand new piece of legislation being looked at (that will "fix" all the old problems). The truth is some systems are very complex and developing large, complex systems is a large, complex task; and, some of the automated systems used by the Federal Government are among the largest, and most complex in the world. The Government's annual computer and computer-related expenditure this year will exceed $25 billion. Few, if any, private companies conduct as many or as complex ADP procurements each year as the United States Government, so the picture of a clogged and hopelessly convoluted procurement system conveniently ignores the fact that the Government's annual volume of computer acquisitions far exceeds the annual ADP procurements of most, if not all, members of the Fortune 500. It is much too simplistic to allege that many companies frivolously bid, time after time, with no hope of winning, thereby wasting government time and money, so the standard of competition must be relaxed! But, the suggestion of "frivolity" is off target! Companies may bid because they've not been able to determine conclusively they are wasting Bid and Proposal money! But, believe me, company Bid and Proposal

money is "dear" and over time its waste will be self-correcting--by company managers with incentives having nothing to do with federal procurement!

LEVEL OF STANDARD DETERMINES LEVEL OF BEHAVIOR

Even more distressing is the serious legislative discussion of a returning to a subjective standard for competition--"maximum practicable competition"--and the apparent congressional willingness to give up hard won, excellent competitive standards. Should a congressional majority vote to have federal competitions held to and critiqued by lesser standards, as other composers wanted Mozart's music held and critiqued--saying it had "too many notes"--the quality of government procurement will be degraded--even as Mozart's music would have been degraded had he not refused to write to a lesser "standard." How many of us train our children to do what is right, truthful, and good--only to "the maximum degree practicable?" Tell them to do their homework--but only to the "maximum extent practicable?" And, how many waste time applying to colleges with unclear admissions criteria and admissions availabilities only "to the maximum extent practicable?" How many of us teach others to obey the law--only to the "maximum extent practicable?" How many of us ask for our sins to be forgiven, but only to the "maximum extent practicable?" And which representatives among you want your election votes tallied by hostile clerks in hostile districts, required to be fair and accurate only to the "maximum extent practicable?"

If we would reject a lesser, subjective standard in these private areas, under the influence of what strange logic would we use it to do otherwise than guarantee the first and primary public obligation: absolute integrity in the stewardship of public procurement funds. The lesser standard would neither guarantee market OPENNESS to all, nor procurement FAIRNESS, nor competitively discounted COST SAVINGS for the government, nor would it be solidly grounded in either a CONSENSUS or a BALANCE OF PUBLIC AND PRIVATE SECTOR INTERESTS. If you do adopt the easier, more permissive standard, I tell you: The Big Camel's nose will be under the edge of your tent. Caveat Emptor.

THE CONTINUING NEED FOR IMPROVEMENTS AT THE GSBCA

By way of background, Congress provided the GSBCA with its bid protest authority in CICA because the General Accounting Office's bid protest process was ineffective. Congress found that "GAO makes every attempt to give agencies discretion in how

and in what timeframe they respond to a protest, and has been hesitant to challenge any but the most blatant agency actions." As a consequence, the then-current bid protest process did not provide an adequate remedy to those wrongly excluded from procurements (House Report No. 98-1157, "Competition in Contracting Act of 1984," p.23, October 10, 1984.) Congress correctly found that the GSBCA's established processes for uncovering facts in procurement disputes were needed in ADP protests, which often turned on complicated technical issues.

It would be a mistake to abolish the Board's jurisdiction, as some would have you do, and require all high technology protests to be tried at the GAO or other fora, as they and others are currently recommending. The Board is generally able to resolve cases quickly. The expertise of GSBCA judges enables them to process protests typically in less time than it takes in Federal court for a government defendant to file an answer. Constitutional limitations on the GAO's role will always compromise GAO's efforts to provide an effective bid protest forum. Since GAO is an arm of the Congress, it cannot order executive branch agencies to take specific actions. This means that agencies can override protest-related suspensions of procurement authority in GAO protests, but not at the Board. It also means that agencies can, and sometimes do, ignore GAO recommendations. The GAO also lacks strong tools to compel agency production of documents.

ONE-SIDED TESTIMONY: WHERE ARE THE POSITIVES?

One of the several, irritating testimonies by the "Do Away With The BCA" crowd this last year has been a selective, denigrating focus on "delay"-- with **no** mention that when agency procurements have been delayed by upheld bid protests, **the delay occurred because the agency violated the law,** so it created the need to take corrective action. Their "Testinnuendo" is used in such a way to suggest that there's something bad about law causing delay; and, if the delay hadn't occurred, all kinds of good things would have happened. But the good things didn't happen, so the law must be bad and should be eliminated. I've not heard one congressperson challenge that testimony--that according to the same reasoning, the country would be crime free, if Congress would only decriminalize everything!

Even more irritating is no mention in the "Testinnuendo" that the corrective actions have resulted in savings to taxpayers. In fact, **one of the procurements used as a "horror story" in several hearings was an ultimate success because the Air Force**

appropriately implemented GSBCA decisions. The Desktop IV procurement is considered a highly successful acquisition that has resulted in the procurement of nearly 300,000 state-of-the art personal computers by numerous Government agencies. A large measure of the procurement's success stems from bid protest decisions of the GSBCA. **The Desktop IV contracts were originally awarded at an evaluated life cycle cost of $1.2 billion.** In response to vendor protests, the Air Force unilaterally terminated the contracts before the case was tried by the GSBCA. The Air Force subsequently awarded a contract to a single vendor. The Board found that the vendor had proposed monitors that did not comply with the Trade Agreements Act, and that the Air Force failed to properly apply the procurement solicitation's provisions requiring consideration of dual awards. **When the Air Force awarded two contracts with an aggregate evaluated cost of $724 million the department saved approximately half a billion dollars as a result of the protests.** The dual awards were the direct result of the GSBCA's protest decision. **Instead of praise, the GSBCA gets "Testinnuendo" about "protests taking too long." The mind boggles! Will no one ever thank the GSBCA for saving taxpayers half-a-billion (that's $500,000,000) dollars in that one case?**

Of 10,000 procurements last year, 179 were protested, and the GSBCA granted 11. You just can't claim the GSBCA causes widespread and pervasive delays across all of federal procurement on the basis of the numbers! And, as for the claim it takes agencies longer to prepare a "protest free bid," that sounds a little like "I'd have been here sooner if the speed limit weren't but 65."

To the extent that anything or anyone makes agencies take care to follow the law, the GSBCA protest process provides such very significant prophylactic benefits to the small, small/disadvantaged, and larger business communities that they far exceed the costs imposed in the relatively few procurements that are actually protested. **In summary, CCIA gives standing applause to those supporting and strengthening the GSBCA protest process.**

LOOKING FAR INTO THE FUTURE

Our closing caution to you is: Do not forget there are "down-the-pike" basic choices to be made about the unseen infrastructure underlying" procurement process law: there is no open, uniform, smoothly running, cooperative, single-thread mechanism, based on open communications that fosters mutual understanding of

government needs and desirable vendor solutions, desired degree of cost competitiveness, and fairness from requirements definition through negotiation and award. What this really says is: **The system won't be able to really handle truly Functional Requirements until open communications, attitudinal, rule, and cultural, and other changes aren't just "allowed" to emerge, but are encouraged to fully flower in both Infrastructures from the "ground up." There's very much that's "Not OK" that will have to become "OK."** The practice of the system has been and is grounded in "close to the vest" negotiation at crossed purposes and what it conceives competition to entail : Always be right, be silent, ask no questions, be ambiguous, be adversarial, be confrontational, be arrogant, deal only from strength, and "cloak everything in secrecy"-- all because of "The Golden Rules": (1) "Vendors are untrustworthy" and (2) "I got the Gold!"

Now, this sounds harsh, but until Congress gets down to understanding and providing legislation to address the substance of the previous paragraph at that level, and creatively re-engineering so that it's OK for both vendors and bureaucracy to "open up" and share problems, requirements, limitations and dilemmas, resources, "connects," "turf," time, and tools, all the legislation and modern technology in the world won't help. Until an absolutely fundamental change really occurs in Public-Private Sector relationships, you will repeatedly be called upon to legislate "solutions" to adversarial procurement "problems" you thought you'd already solved.

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STATEMENT OF

ED BLACK, PRESIDENT

COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

PRESENTED TO THE

HOUSE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

AND THE

HOUSE COMMITTEE ON NATIONAL SECURITY

ON

H.R. 1670, the Federal Acquisition Reform Act of 1995

MAY 25, 1995

Mr. Chairma(e)n, Members of the Committee(s) I am pleased to testify today on behalf of The Computer & Communications Industry Association (CCIA) and our member companies on H.R. 1670, the "Federal Acquisition Reform Act of 1995." CCIA is an association of some 25 member companies which represent all facets of the computer and communications industry. Collectively, our members generate annual revenues of nearly $190 billion and have substantial involvement in the Federal marketplace. We have long supported procurement reforms passed by both Committees, including the Federal Acquisition Streamlining Act of 1994 (FASA I).

We share the Committees' goals of ensuring a competitive and cost-effective Federal procurement system with an effective enforcement mechanism, and value the good working relationship we have had together for 23 years. During this period CCIA has consistently advocated the benefits of "Open Markets, Open Systems, and Full & Open Competition. "

We thank you for continuing to improve legislation relating to commercial products. We look forward to the

time when the elimination of the remaining exceptions will allow the end of cost and pricing data collection. The savings to government will then be even greater.

As we testified in February, we feel very strongly that Congressional oversight and evaluation of the effectiveness of FASA I is very important and should precede major new acquisition reform initiatives.

Nonetheless, we welcome the opportunity to comment on H.R. 1670. In our estimation, enactment of the bill would have two principal results: it would greatly improve the bid protest mechanism by consolidating the 11 Board of Contract Appeals into one Board along with GAO's bid protest authority; but at the same time it takes away the very tool the Board needs to function properly -- a meaningful and well-defined standard of competition.

We believe the bid protest system is an essential component of federal procurement law. The bid protest system represents a wise policy decision to use private-sector companies as enforcers of federal procurement law.

In addition, an entire body of case law has been developed on the interpretation of what is full and open competition. Changing the competitive requirements to "maximum practicable" from "full and open" will invite legal suit after legal suit as to what the new standard means.

The requirement of full and open competition in the Federal market goes hand in hand with the need for an impartial forum to ensure that there is fairness in the process. It is difficult to have either be effective or beneficial to the Government without the other.

The Government needs all the competition it can get. Competition decreases costs and ensures that taxpayers get the most bang for their buck.

Not only has "full, free, and open competition" fostered cost savings to the Government, it has also helped small, and small disadvantaged, businesses to become a full fledged part of the American mainstream.

One important fact, the consequences of which may not be fully understood, is that the many sectors of our industry are converging. Other legislation in this Congress designed to update our nation's telecommunications laws will accelerate this process by removing legal and bureaucratic obstacles to competition. But whether there is legislation or not, many substantial companies are going to be doing business in areas that outside observers might not anticipate. The federal government should be able to save tax dollars as a result of this convergence and increased competition.

We do not think Congress should risk allowing bureaucratic processes to easily narrow the field of competitors, especially not when new market entrants are growing in dynamic and unpredictable ways. If not

unreasonably constrained, market forces can yield substantial budget and taxpayer savings. The market, not bureaucrats should decide who should compete.

Government should not shortchange itself and deny itself access to the best products at the lowest prices solely because it is easier to maintain the status quo than take advantage of a competitive market. Lack of competition and the promotion of "favoritism" in Federal procurement distorts the American economy by giving an economic advantage to certain companies the Government likes.

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STATEMENT OF THE

COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION

BEFORE THE

HOUSE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

AND THE

HOUSE COMMITTEE ON NATIONAL SECURITY

ON

H.R. 1670, "FEDERAL ACQUISITION REFORM ACT OF 1995"

MAY 25, 1995

CCIA
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Statement of the
Computer & Communications Industry Association
Before the
House Committee on Government Reform and Oversight
and the
House Committee on National Security

May 25, 1995

INTRODUCTION

The Computer & Communications Industry Association (CCIA) is pleased to have the opportunity to testify regarding H.R. 1670, the "Federal Acquisition Reform Act of 1995." CCIA is an association of some 25 member companies which represent all facets of the computer and communications industry. Collectively, our members generate annual revenues of nearly $190 billion and have substantial involvement in the Federal marketplace. Since 1972 we have supported the important procurement reforms passed by both these Committees, including the Federal Acquisition Streamlining Act of 1994 (FASA I).

We support the same goals as the Committees, such as a competitive and cost-effective Federal procurement system with an effective enforcement mechanism. We have enjoyed working with you over the years and look forward to continuing this long-standing relationship. As we said when we testified before you in February, we feel very strongly that any new acquisition reform should occur only after close Congressional oversight and evaluation of the effectiveness of FASA I.

Nonetheless, we welcome the opportunity to comment on H.R. 1670. In our estimation, enactment of the bill would have two principal results: it would greatly improve the bid protest mechanism by consolidating the 11 Board of Contract Appeals into one Board along with GAO's bid protest authority but at the same time it takes away the very tool the Board needs to function properly -- a meaningful and well-defined standard of competition.

NEED FOR FULL AND OPEN COMPETITION

In attempting to "fix" deficiencies in the Federal procurement system, we are concerned that H.R. 1670 apparently has the unintended effect of "unfixing" those parts of the system which are working and working well. It is imperative, in these times of fiscal responsibility regarding taxpayer dollars, that the Government obtains quality goods and services in an efficient, effective, and economical manner. CCIA believes that this can only be accomplished through full and open competition in the Federal marketplace.

What Competition Is and Is Not.

CCIA's primary concern with H.R. 1670 is that it removes the concept of full and open competition from the Federal procurement arena. This decision appears to have been based on a different perception as to what full and open competition is and is not.

First, in order to fully appreciate why full and open competition is crucial to Federal procurement, we need to understand why Congress found it necessary to enact such requirements in the first place. The requirement of full and open competition was a bipartisan effort on behalf of Congress in 1984 to "ensure that new and innovative products are made available to the

Government on a timely basis and that all interested offerors have an opportunity to sell to the Federal Government." H. Rep. No. 1157, 98th Cong., 2d Sess. 11 (1984). The Competition in Contracting Act (CICA), which requires full and open competition, was passed by a Democratic House, under the sponsorship of Congressmen Jack Brooks and Frank Horton and by a Republican Senate, under the sponsorship of Senators William Roth, Carl Levin and William Cohen. The legislation was signed into law by then President Ronald Reagan.

While some say that the choice between maximum practicable and full and open competition is simply a word exercise, H.R. 1670 goes beyond a definitional change by removing the safeguards from CICA that requires procurements to be competitively awarded. H.R. 1670 completely eliminates the Competition in Contracting Act's requirements for justifications and authorizations prior to using other than competitive procedures. These requirements, coupled with a strong bid protest system are the primary reason for the increase in competition produced by CICA. **Without a meaningful justification and authorization process, there is no brake within the agencies to prevent noncompetitive procurements from occurring.**

Prior to the enactment of CICA, agencies were required to compete negotiated contracts to the maximum extent practicable. One of the Act's sponsors' observed that while there was a strict textual definition of the level of competition required, agencies were able to discover large loopholes for avoiding competition. "The justification most frequently invoked [wa]s the 'competition is impracticable' exception, which agencies sometimes improperly use to award sole-source contracts." Hon. William S. Cohen, The Competition in Contracting Act, 14 Pub. Cont. L. J. 1, 15 (1983). In addition, Congress found that agencies were issuing overly-detailed specifications that

unnecessarily restricted the procuring agency from considering acceptable alternatives. Many times the detailed specifications resulted in only one contractor being able to meet the agency's needs.

The former House Committee on Government Operations determined that

> [l]left unchallenged, [lack of competition] will subject the [Federal procurement] process to untold waste and abuse, and eventually harm the viability of critical agency programs. Rather than address these problems, agency procurement officials continue to complain that seeking full and open competition is too complicated and time consuming. They assert that it is less risky and considerably more manageable to do business with a few selected vendors instead of encouraging all qualified companies to enter the Federal marketplace.

H. Rep. No. 1157, 98th Cong., 2d Sess. 11 (1984).

The Committee determined that the reason for this lack of competition was that laws and regulations did not adequately require that competitive procedures be used:

> The FAR state[d] that sufficient competition is achieved as long as offers are received from at least two independent sources that are capable of satisfying the requirements of the agencies. Thus, the standard for competition is not whether an agency has opened up a procurement to all qualified sources, but whether it received at least two bids. In the Committee's view, an acquisition is hardly competitive when it is limited to just two independent sources, since additional bidders are often available to meet a Government requirement. Using the traditional view, an agency may select two of its favorite vendors and then assert that a 'reasonable degree of competition' had been achieved. The Committee believes that full and open competition exists only when all qualified vendors are allowed to compete in an agency acquisition.

H. Rep. No. 1157, 98th Cong. 2d Sess. 16 (1984).

As one author of CICA put it "[c]ompetition maintains integrity in the expenditure of public funds by ensuring that Government contracts are

awarded on the basis of merit rather than that of favoritism." Hon. William S. Cohen, The Competition in Contracting Act, 14 Pub. Cont. L. J. 1, 5 (1983).

Second, contrary to current belief, CICA does limit the field of vendors who are eligible to compete for Government contracts. The Senate Committee on Governmental Affairs, in enacting CICA, was careful to point out that it "strongly believe[d] that all contractors should have the opportunity to compete for a Government contract, while only those capable of meeting the Government's needs should be considered for award." Hon. William S. Cohen, The Competition in Contracting Act, 14 Pub. Cont. L. J. 1, 33 (1983).

CICA limits competitors to those who submit proposals in the competitive range. Under the FAR contracting officers may only award the contract to a competitor who is both responsive and responsible. Thus, there is ample authority under CICA for the contracting officer to impose limitations that allow the Government to reject proposals of vendors who do not meet the Government's needs.

Third, the Committee's background paper on H.R. 1670 stated that "the procurement system can no longer afford competition for competition's sake, but must move to the process of meaningful competition between vendors who can meet or exceed the Government's needs." On the contrary, in today's fiscal climate, the Government needs all the competition it can get. Competition decreases costs and ensures that taxpayers get the most bang for their buck. A decrease in competition will result in an increase in cost to the Government. Studies have indicated that an increase in competition can save between 15 and 50%. Hon. William S. Cohen, The Competition in Contracting Act, 14 Pub. Cont. L. J. 1, 4 (1983).

In fact, the last procurement reform group to study the Federal acquisition system, the Acquisition Law Advisory Panel (Section 800 Panel) "concluded after extensive discussion that retreat from the 'full and open competition' standard was neither warranted or wise." Acquisition Law Advisory Panel, Streamlining Defense Acquisition Laws, 1-24 (January 1993). In making this determination, the Section 800 Panel was mindful of Congress' concern that exclusion of one qualified vendor can prevent the Government from having received its money's worth. See Id.

Fourth, H.R. 1670's statutory definition of competition is ambiguous regarding the restrictions as to when a particular source(s) can be excluded and when other than competitive procedures can be used. By leaving this language unclear, Congress is abdicating its authority to the Executive Branch to determine the level of competition of Federal procurement. Historically, the Executive Branch has attempted to restrict competition as much as possible; that is why we ended up with the Competition in Contracting Act in 1984.

Fifth, this bill would restrict the ability of the market to deliver the best possible products at the lowest price by limiting competition for Federal contracts. The economy fluctuates and the same companies cannot be counted on, year after year, to meet the Government's needs in the most efficient and cost effective manner. There are entrepreneurs right now developing innovative new products and services who could well be foreclosed by this legislation from competing in the Federal market. If this were to occur, the real losers would be the taxpayers.

A business participating in the commercial marketplace that does not continue to keep up with the latest technology will be left in the dust. Consumers will be concerned with future suitability and the then current

usefulness of products and services not with how good they might have been in the past. The Federal Government should not shortchange itself and not receive the best products at the lowest prices solely because it is easier to maintain the status quo than take advantage of a competitive market. Lack of competition and the promotion of "favoritism" in Federal procurement distorts the American economy by giving an economic advantage to certain companies the Government likes and inhibits the growth of other firms for other than meritorious reasons. The taxpayers deserve more for their money than having a few large corporations supply the Government with average products or services at average prices just because it is too much trouble to let the competitive market work.

The procurement system depends on Government employees to do what is right, not that which is easy. Doing what is right may take longer than picking an easy favorite time after time. We believe the procurement system itself needs to be structured to encourage correct conduct. It is imperative that fully competitive market forces are allowed to flourish.

Requiring only maximum practicable competition will take the country back to where it was 11 years ago, not ahead to the next century.

H.R. 1670's Effect on Government Savings

The lack of competition in DoD contracting was a concern of Congress when it enacted CICA and it is still a concern today. This legislation was partially inspired by DoD and other procurement cost problems: DoD pays between 18 and 19 percent more for their goods and services due to regulatory implementation and operational burdens. However, these premiums are largely due to accounting, recordkeeping and other burdens that DoD imposes

on contractors – burdens that have nothing to do with the level of competition in DoD procurements. Competition has saved the Government hundreds of billions of dollars. These savings have taken place not just in the relatively "unburdened" civil market, but also in DoD – where the bill substitutes "maximum practical competition," for "full, free, and open competition," thereby denying Government the benefits of wide-spread competitive discounting. Not only has "full, free, and open competition" fostered cost savings to the Government, it has also helped small, and small disadvantaged, businesses to become a full fledged part of the American main stream. "Maximum practicable competition" provides little or no similar comfort to the entrepreneur.

CCIA is concerned that the test program provisions in H.R. 1670 will inadvertently prevent certain qualified companies from participating in Federal procurements. In FASA I, the ability of Executive agencies to conduct test programs was tied to the implementation of a full FACNET capability. H.R. 1670, however, removes this requirement. Since some test programs may involve the omission of a Commerce Business Daily notice, small and small disadvantaged businesses will not know where there is available Government business for which to compete. In addition, coupling the test program with full FACNET implementation is a powerful incentive to complete FACNET promptly. There is a strong need for a uniform system of electronic commerce. Currently, some vendors must search over 50 electronic bulletin boards to keep up with the Government's procurements. FACNET should end the need to navigate through an electronic maze. We should not delay full FACNET implementation.

NEED FOR EFFECTIVE ENFORCEMENT OF FULL AND OPEN COMPETITION

As we testified earlier this year, CCIA has been deeply concerned by proposals to eliminate or weaken the GSBCA bid protest authority, which was established under the 1984 Competition in Contracting Act (CICA). We are pleased that legislation maintains a strong bid protest forum which is crucial to a competitive Federal procurement market.

In these fiscally difficult times, the merging of the Boards of Contract Appeals and consolidating the bid protest authority of the GSBCA and GAO into one forum helps to further the Government's goal of downsizing while efficiently and cost effectively conducting its business. We believe that requiring the current Chairman of the GSBCA to serve as the Chairman of the consolidated Board during the first two-year period will be beneficial for a smooth and efficient transition. Only the GSBCA has experience in deciding bid protest cases as well as contract disputes and the consolidated Board will be well served by such experience.

While we are delighted that there will be an adequate Federal protest forum, we are deeply concerned that the removal of the full and open competition requirement will greatly diminish the ability for competitors to seek redress for unfairly conducted Government business. The key to the Board's successful infusion of competition into the procurement process is its ability to enforce the proper application of laws and regulations requiring competition. If those laws and regulations are not adequate in requiring competition, then the protest system is rendered basically meaningless.

In addition, an entire body of case law has been developed on the interpretation of what is full and open competition. Changing the

competitive requirements to "maximum practicable" from "full and open" will invite legal suit after legal suit as to what the new standard means. Full and open competition is understood by competitors, the Government, and the legal forums. The United States Board of Contract Appeals (USBCA) will spend most of its time interpreting this new standard, not preserving competition in the Federal marketplace.

The current GSBCA protest forum is a continuous monitor of the Government's devotion to keeping the system fair, open and competitive. The bid protest system represents a policy decision to use private-sector companies as enforcers of federal procurement law. Through the protest forum, the Government essentially lets the market oversee the system. Companies who do business with the Government are authorized to file protests with impartial administrative bodies whenever they believe that agencies are designing procurements unfairly or awarding contracts improperly. It anticipated that citizen oversight would preserve the benefits of a competitive Government marketplace and it has.

This system has a number of benefits. First, unlike Government auditors, private vendors are almost always "on the scene" when a violation occurs. Second, the protest process provides a mechanism for oversight without establishing cumbersome enforcement bureaucracies. However, the private sector will not assume this enforcement role without some assurance that it will achieve meaningful results in meritorious protests. The suspension process assures that agencies will not be able to spend money under illegal contracts, and then use the cost of termination as a reason to continue contracts that should never have been awarded.

Having this forum available to competitors for Federal business, means that the Government will receive the benefits of a highly competitive

market. Companies are more likely to compete for sales in an environment in which they receive equitable treatment. The entry of more competitors into the market prompts each vendor to be more innovative and to offer better prices and quality in an effort to convince agencies that they should award that firm contracts. The requirement of full and open competition in the Federal market along with an impartial forum to ensure that there is fairness in the process go hand in hand. It is difficult to have one be effective and beneficial to the Government without the other.

CONCLUSION

The legacy of earlier procurement reforms, enacted on a bipartisan basis over the past decade, could be severely crippled by H.R. 1670. Again, CCIA strongly recommends that any new reform measures should only be enacted after careful evaluation and review of FASA I initiatives. Otherwise, we run the risk of a throwback to earlier eras in Government procurement that were marked by scandal, a lack of basic accountability, and public outcry. In this era of constricted budgets and limited taxpayer dollars, it is crucial that the Federal procurement system is run fairly, efficient, and most important, cost effectively. This can occur most effectively if the Federal market maintains full and open competition.

Association of
Government Marketing Assistance Specialists
PO Box 1704, Orange, TX 77630 (409) 886 0125 Fax (409) 886-2849

28 June 1995

The Honorable Jan Meyers, Chair
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515

RE: HEARING on Small Business Participation in Federal Contracting: Assessing H.R. 1670, the "Federal Acquisition Reform Act of 1995"

Dear Representative Meyers,

I am writing this letter as the President of the Association of Government Marketing Assistance Specialists (AGMAS) on behalf of the 113 Procurement Technical Assistance Centers (PTAC) located throughout the United States. We represent hundreds of procurement professionals that are currently assisting approximately 60,000 small and mid-sized businesses conducting business with the Federal Government. We are closer to the issues and concerns of proposed H.R. 1670 as we work with the small business community on a daily basis. I apologize for not attending this hearing in person as I was not available at this time. With due notice I would be more than willing to attend and testify at any subsequent hearings on this matter.

Our collective opinion is that the implementation H.R. 1670 would result in a procurement process that is less competitive, less open and fair, provide diminished access to the small business community and thus diminish the ability of small businesses to sell to the government. We are concerned and somewhat perplexed on how quickly this bill is proceeding when the small business community does not fully comprehend the sweeping changes made by the Federal Acquisition Streamlining Act of 1994 (FASA). We do agree with a streamlined process that will save taxpayers dollars, but if the implementation is not done carefully the small business community will be severely damaged in this process. The small business community needs to be more involved in this process before more sweeping changes are made.

Our main concern is with some of the "fundamental" changes proposed by H.R. 1670 which we feel are unsound. Changes such as abandoning "full and open competition," permitting "simplified procedures" for the purchase of "commercial products" with no dollar limitations, repealing pre-qualification of contractors and not providing adequate notice of contracting opportunities would jeopardize any advancements made to the procurement process over the past fifteen years. By implementing these changes it would leave "much too much" discretion in the hands contracting officers allowing these contractors to fulfill

their contracting requirements by merely making three phones calls for any purchase. This would bring us back to "sole-source" contracting which is not in the best interest of the government or the small business community. These proposed changes would result in higher prices, less quality and more importantly would open the door to fraudulent activities setting the present procurement process back twenty years. These conditions were the exact reasons why the "Competition in Contracting Act of 1984" came about and the government has benefiting greatly from this resulting and improved process.

If we are to make sweeping changes to the current system we should focus on those areas that will save the government money yet still provide "equal and fair" access to the small business community. "Full and open Competition" must remain, "simplified procedures" should be limited to contracts under $100,000 for agencies that properly implemented FACNET as provided in FASA of 1994. Once FACNET is properly implemented, providing electronic access to contracting opportunities, then higher thresholds can be considered. It is our opinion that the proper implementation of FACNET will save the government billions of dollars in mere processing yet still provide the proper access to those small businesses.

In closing we ask that a "fair and equitable" assessment process be undertaken prior to enacting additional and sweeping changes as proposed in H.R. 1670. We are in full support of the streamlining intent but want to insure that the final legislation proposed has the proper elements that accomplish the mutual objectives of government and the small business community. I urge you to work with our organization as we can fairly represent the small business community and their concerns.

If I can be of further assistance or if you will be conducting future hearing I can be reached at 203-449-8777.

Sincerely,

Michael Franklin
President

STATE OF
RHODE ISLAND

PORT AUTHORITY AND ECONOMIC DEVELOPMENT CORPORATION

June 27, 1995

The Honorable Patrick Kennedy
U.S. House of Representatives
1505 Longworth H.O.B.
Washington, DC 20515

Dear Congressman Kennedy:

I am writing to voice my concerns about House Resolution 1670 and the effects that this bill will have on the small business community. If passed, this bill will result in a procurement process that lacks competition, and virtually eliminates the small business community's opportunity to compete for contracts with the government.

Under H.R. 1670, the laws pertaining to competition for contracts will allow Contracting Officers to conduct the bidding process using "maximum practicable competition." This changes the current language which best serves small businesses by requiring "full and open competition" for all government contracts. Full and open competition increases participation by small businesses in the procurement process and helps to ensure that the government receives quality products at a reasonable price.

Maximum practicable competition would also authorize a Contracting Officer to establish a list of "verified" vendors, which have met certain criteria, and allow only these firms to compete for a contract. Contracting Officers can limit competition to companies which they have pre-qualified through a fair and open process today, but the current pre-qualification system has safeguards built into it which protect small businesses from arbitrary exclusion from the process. Repealing these safeguards would leave small businesses trying to enter the government market with little chance for success.

Currently the government is required to provide adequate notice of contracting opportunities. This ensures that firms capable of providing a contract have the opportunity to do so. Without adequate notice, the small business community will be at a competitive disadvantage. Many small firms will be unable to submit bids for contracts for which they may be best qualified. This will limit the government's potential to receive the best value and reduce the likelihood that it would make use of innovation.

This bill allows Contracting Officers to utilize simplified acquisition procedures for all contracts issued government-wide. These procedures will allow a Contracting Officer to place three telephone calls to potential bidders and consider this to be "competition." FASA allowed for the use of simplified procedures for contracts below $100,000, at agencies that have implemented the FACNET computer bid system. Under FASA's limitations the government reduces the administrative burden associated with contracts and ensures proper oversight of larger contracts which may require more attention.

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It is clear to all involved with government procurement that changes are necessary. This bill addresses some of the issues which appear to be limiting. However, in its attempt to reduce administrative burden, this bill places the future participation of small business in the procurement process in doubt. Therefore to protect the small businesses here in Rhode Island, and across the United States, the sections of H.R. 1670 which will initiate the above changes must be stricken from this bill before passage.

I thank you for your attention to this matter.

Sincerely,

Daniel E. Lilly, Jr.
Procurement Administrator

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